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Solicitor General.

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Attorney for Federal Trade Commission.

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CHARLES ELMORE CROPLEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ALGOMA LUMBER COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for
Algoma Lumber Company, et al., Respondents.

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THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 64 F. (2d) 618, and is printed at page 1889 of the record herein. The decree of the court was entered on April 4, 1933 (R. 1899). Petition for cer-

tiorari was filed July 3, 1933, and was granted October 9, 1933 (R. 1900).

REPORT AND ORDER OF THE FEDERAL TRADE COMMISSION.

The report and order of the Federal Trade Commission are printed in the record at pages 26-48 inclusive.

STATEMENT OF THE CASE.

On or about May 23, 1929, the Federal Trade Commission, purporting to act in the public interest, filed complaints against the respondents and certain other lumber producers charging in brief that the use of the term "California White Pine" in the sale in interstate and foreign commerce of lumber yielded from the tree *Pinus ponderosa* is an "unfair method of competition" forbidden by Section 5 of the Federal Trade Commission Act. The trade name thus assailed came naturally and honestly into existence many years ago, and has been used by respondents and their predecessors continuously for more than 30 years in marketing this lumber throughout the United States.

Respondents own and operate lumber mills in the Sierra Nevada pine belt in California and southern Oregon. The lumber which they produce is yielded by the dominant pine of the Sierra forests, known to botanists as *Pinus ponderosa*. This lumber is marketed under the name "California White Pine" (Findings of Commission, Paragraphs two and three—R. 28).

As early as 1880, this lumber was marketed locally in California, New Mexico and Arizona under trade names

which included the words "white pine." By 1886 it was being generally marketed under terms including "white pine" in California, Nevada and Utah, with occasional shipments to the eastward. By about 1900 it had progressed into middle western territories and by 1915 national distribution was completed by entrance into New England (Findings of Commission, paragraph thirty—R. 33).

As this lumber commenced to move in volume into the markets of the Middle West and East, it naturally retained its established local name, "California White Pine." There were additional reasons for the employment of this commercial name. Then, as now, there were two types of pine lumber known to trade and industry—viz., "white pine" and "yellow pine" (R. 282). "White pine" lumber is white in appearance and soft in texture and its primary use is for shop or finish purposes—e. g., in the manufacture of sash and doors and interior trim (R. 613). "Yellow pine" lumber, on the other hand, is yellow in color and hard in texture and its primary use is for structural purposes where strength is required (Findings of Commission, Paragraph ten—R. 30). Respondents' lumber is of the "white pine" type, and far removed from the "yellow pine" type. Accordingly, it has always been known to trade and industry by a "white pine" name (R. 159, 778-9, 1368-9). The word "California" has been included for the purpose of specific identification.

The record shows without conflict that the name "California White Pine" was employed in national distribution in order to avoid confusion with the typical yellow pine lumbers of the southern states (R. 1189, 1206, 1273).

Until very recently no other trade name had been called into being. In short, from the introduction of this lumber into the channels of interstate commerce and continuously throughout the years, it has been predominantly known as "California White Pine."

In or about the years 1924 and 1925 a movement directed to a change in commercial nomenclature arose within the industry. Certain lumber manufacturers proposed a change from "California White Pine" to "Pondosa Pine" (a corruption of "ponderosa"), and such change was actually made by some of the producers. These respondents were unwilling to abandon the use of "California White Pine" (Complaint of Federal Trade Commission, Paragraph eight—R. 8). They were opposed to the newly coined "Pondosa" name. Thereupon the proceedings were commenced by the Commission.

Pursuant to its conventional practice, the Commission instituted its proceedings in response to *ex parte* representations and inquiries. The complaints tendered certain charges of fraudulent motive and wrongful conduct in the origin and use of the name, but these charges wholly failed of proof and were of necessity abandoned. The averments of the complaints were erroneous in other material respects. We take note of these unfounded charges and erroneous averments at this juncture in order to preclude misunderstanding as to the nature of the case tendered by the complaints and alike as to the nature of the case actually developed by the evidence.

Averments of complaints which failed of proof.

(1) The complaints charged that respondents sell their lumber, and designate it on letterheads, bill-heads and invoices, as "white pine," with or without the addition of further words of identification (R. 6). The evidence shows that the full term "California White Pine" has invariably been used by respondents, and the Commission has so found (Commission's Findings, Paragraph three—R. 28).

(2) The complaints aver that *Pinus ponderosa* does not "in the character of lumber made therefrom, belong to that group of pine species known as white pine * * *" (R. 6). The proofs shows without conflict that the character of this lumber places it in the white pine group (R. 159, 778-9, 1368-9).

(3) The complaints aver that *Pinus ponderosa* is, "by the average commercial qualities and characteristics of the species, a member of the aforesaid yellow pine group" (R. 7). The proofs show without conflict that in commercial qualities and characteristics this lumber is far removed from the yellow pine group (R. 159, 778-9, 1368-9).

(4) The complaints allege that the term "California White Pine" "was adopted and has been continued by respondents and other manufacturers thereof as a substitute for that of western yellow pine * * *" (R. 8). The record shows without contradiction that "California White Pine" was not adopted as a substitute for western yellow pine or as a substitute for any other name whatever. From the beginning this lumber carried a "white pine" name (R. 1189, 1468, 1470-2).

(5) The complaints aver that the term "California White Pine" "was adopted and has been continued by respondents and other manufacturers * * * in order to cause the trade and buying public to minify or ignore the characteristics wherein *Pinus ponderosa* is inferior to *Pinus strobus* * * *" (Northern White Pine) (R. 8). The record shows without conflict that "California White Pine" was adopted for the purpose of avoiding confusion with the typical yellow pine lumber of the southern states (R. 1189, 1206, 1273).

(6) The complaints charge that jobbers and retailers have been "misled into buying *Pinus ponderosa* in the belief that they thus secure genuine white pine * * *" (R. 9). No jobber or retailer has so testified.

(7) The complaints charge that respondents and other manufacturers "have been enabled to fill and have actually filled orders for genuine white pine with consignments of *ponderosa* pine" (R. 10). The record contains no proof that any respondent, or any person in privity with any respondent or otherwise, has at any time "filled orders for genuine white pine with consignments of *ponderosa* pine."

It appears accordingly that the complaints were founded upon two major premises which were false in fact: *first*, that the name "California White Pine" had been devised and used for the purpose of misleading and deceiving the trade and the public, and, *second*, that the characteristic qualities and uses of this lumber place it in the "yellow pine" group rather than in the "white pine" group. As to the first premise, counsel for the Commission was com-

pelled to admit upon brief filed before the Commission that *"there is no proof that the practice of designating ponderosa products by terms including the word 'white' was adopted for the purpose of misleading or deceiving the trade or the public."* As to the second premise, it is established incontestably that "California White Pine" lumber belongs in the "white pine" group in physical properties and essential industrial utility.

In order to make it clear beyond the possibility of a doubt that the Commission has expressly exonerated respondents from improper motive in the adoption of this trade name, we quote the following from page 80 of the brief for the Federal Trade Commission in these proceedings before the Circuit Court of Appeals:

> "It is true that the Commission alleged in its complaints that the respondents were actuated by an intent to secure the advantage of the association of the public mind with true white pine in the adoption of the term here in controversy.
>
> Such evidence as the Commission offered, as respects the origin of the term, indicated that the term 'California White Pine' was used before Northern or Idaho white pine came into local market where 'California White Pine' was offered, and that the term was adopted to avoid confusion with the hard 'yellow pine' of the south.
>
> *Accordingly, the allegations as to the improper motive at the adoption of the term 'California White Pine' were not sustained."* (Emphasis supplied.)

Having failed completely to sustain the complaints upon these major issues *(and these were the only substantial*

charges tendered), the Commission was relegated to *botanical* distinctions. Briefly stated, the claim appears to be that since the tree *Pinus ponderosa* has been grouped by botanists with those pine species commonly styled "yellow pines," the lumber which it yields may not lawfully be called by a commercial name containing the word "white." It will be found upon final analysis that the entire argument of "misdescription," "confusion" and "substitution" has been founded precariously upon the botanical criterion. But this issue was also found to rest upon a false premise, since the record shows without conflict that botanical classification and nomenclature have nothing in common with commercial nomenclature, that lumber buyers are not concerned with botanical distinctions and that their sole concern is with the characteristics of the lumber. The Commission now so concedes in its findings (Commission's Findings, Paragraph sixty-two—R. 39).

Notwithstanding that the material issues were thus resolved in their entirety against the allegations of the complaints, the Commission nevertheless proceeded upon its course.

Summary of essential facts from the record before the Commission.

For convenience the several complaints were consolidated for hearing and disposition. The controlling facts, as we conceive them, developed in the course of the proceedings before the Commission may be set forth in summary form as follows:

1. "California White Pine" is the commercial or trade name under which the lumber yielded by the

tree identified botanically as *Pinus ponderosa* has been marketed throughout the United States for more than 32 years last past. (In the Pacific Coast area since 1880 and nationally since 1900.) (See Paragraph thirty, Findings of Federal Trade Commission—R. 33.)

2. "California White Pine" was adopted as the commercial name for this lumber in order to distinguish it from the typical "yellow pine" lumbers of the southern states. (It is stated upon page 5 of the petition for certiorari in this cause that "the original purpose for the adoption of this term was to distinguish this lumber from the hard 'yellow pine' of the South.") (R. 1189, 1206, 1273.)

3. The botanical grouping of pine *trees* has no relation to the commercial nomenclature or industrial utility of pine *lumbers*. Botanical groupings respond to plant characteristics, while commercial groupings respond to physical properties and industrial use (R. 707, 962-3, 1366, 1387, 1450, 1822-3, 1827, 1839-40, 1845; see also Paragraph five, Commission's Findings—R. 28-29).

4. The *Pinus ponderosa* tree is conventionally assigned by botanists to the so-called "pinaster" or yellow pine group, but the lumber which it yields belongs with the white pine lumbers in mechanical properties and industrial utility (R. 778-9, 794, 812, 1368-9, 159, 168-9, 358, 731, 1082, 1123, 1338, 1374, 1408, 1410, 1666-7, 1863, 1824-5, 1832). (The following is quoted from page 9 of the petition for certiorari: "*This is*

botanically a yellow pine but, from the standpoint of its industrial uses, is more closely allied with white pine." Emphasis supplied.)

5. The pine lumbers of the United States have been placed by trade and industry in two groups—viz., the white pine group and the yellow pine group. "California White Pine" has always been known to trade and industry as a white pine lumber (R. 282). It is far removed from typical yellow pine lumbers in mechanical properties and industrial utility. White pine lumbers are used for "finish" and "mill-work"; yellow pine lumbers are used for structural purposes (see references to Record under paragraph 4 *supra*).

6. It is admitted on the part of the Commission that "there is no proof that the practice of designating *ponderosa* products by terms including the word 'white' was adopted for the purpose of misleading or deceiving the trade or the public" (Brief for Federal Trade Commission in proceedings before the Commission, p. 87).

7. Scientific tests made at the United States Forest Products Laboratory at Madison, Wisconsin, show that in mechanical properties the lumber of *Pinus ponderosa* (California White Pine) belongs in the white pine group and is far removed from the yellow pine group (Respondents' Exhibits 21-23, 32; R. 778-780, 783, 784, 1368-9).

8. The experts of the United States Forest Products Laboratory at Madison, Wisconsin, state that there

are no tests which they regard as reliable permitting a conclusion as to the relative durability of *ponderosa* pine and the botanical white pines (R. 816, 820, 821, 822).

9. There is neither proof nor finding that the term "California White Pine" was devised or that it has been used for the destruction or restriction of competition, or for the purpose of trading on another's name. There is no proof that any respondent has at any time sold or invoiced this lumber under any other term than the full name "California White Pine."

10. "California White Pine" has been formally adopted and recommended as a "preferred commercial name" for this lumber by the Bureau of Standards of the United States Department of Commerce. This recommendation has been accepted by the major organizations of the lumber industry and by the American Institute of Architects (Respondents' Exhibit No. 31; R. 1353, 1360-1363).

These statements of fact are unassailable. They are established without conflict of record.

If we may single out the facts which appeal to us as being dominant in the cause, they would be briefly these:

First: That the botanical grouping of pine *trees* has no relation to the commercial grouping of pine *lumbers;*

Second: That there are only two groups of pine lumbers known to trade and industry—viz., the white

pine group and the yellow pine group—and that California White Pine belongs in the white pine group in physical properties and in industrial utility;

Third: That the term "California White Pine" came into being naturally and honestly, *admittedly without improper motive,* and that it has been used for upwards of 30 years throughout the United States in identifying and marketing this lumber.

Material facts not found by Commission.

The court should be advised that the Federal Trade Commission refrained from making findings with respect to certain phases of the record which were obviously material. Specifically it failed to find:

(1) That scientific tests conducted by government experts at the United States Forest Products Laboratory at Madison, Wisconsin, demonstrate that in mechanical properties, *ponderosa* lumber belongs with the white pine lumbers and not with the yellow pine lumbers (R. 778-780, 1368-9).

(2) That the government experts at the United States Forest Products Laboratory at Madison, Wisconsin, testified that there have been no scientific tests regarded as reliable which can afford a conclusion as to the relative durability of *ponderosa* pine and so-called botanical white pine lumbers (R. 816, 820-822).

(3) That "California White Pine" has been formally adopted and recommended as a "preferred commercial name" for this lumber by the Bureau of

Standards of the U. S. Department of Commerce (R. 1353, 1360-3).

All of this evidence was material to the issues, and yet the Commission studiously avoided making appropriate findings. It failed to report the results of the "mechanical properties" tests made by the United States Forest Products Laboratory. It predicated its findings respecting wood quality upon the opinions, prejudices and preferences of lay witnesses. It made no reference whatever to the approval of "California White Pine" by the United States Bureau of Standards.

The court below properly commented upon these material portions of the record (see opinion of the Circuit Court of Appeals, R. 1891-2, 1893, 1894).

The order of the Commission.

On June 8, 1931, the Commission made its findings and orders. The orders required each respondent to "*cease and desist from using, either orally or in writing, the word 'white' in connection, combination or conjunction with the word 'pine' or in connection with other word or words used in combination or conjunction with the word 'pine'*" (R. 47).

By these orders the Commission required the effectual suppression of this trade name, with all of the goodwill acquired throughout more than thirty years of continuous use in the lumber markets of the United States. Respondents are forbidden to call this lumber "white," either orally or in writing, in association with any other words

whatsoever. They are denied the use of the particular word which is essential in order to convey to trade and industry the characteristics and the industrial utility of this lumber. They may not call it "white" even though they should be willing to add other words of specific identification. This attempted suppression of a long-established trade name, honestly adopted and honestly used, would seem to exceed the furthermost bounds of the administrative authority committed to the Commission.

Proceedings in the Circuit Court of Appeals.

In proper course, in pursuance of Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), these respondents filed their petition in the Circuit Court of Appeals for the Ninth Circuit seeking a review of the Commission's orders (R. 1879-1883). On April 4, 1933, the Circuit Court of Appeals filed its opinion in the cause. The opinion of the court concludes as follows:

> "It is the conclusion of the court that, viewing the testimony in the light of all the facts of the case, it is insufficient to support findings that petitioners' use of the commercial name 'California White Pine' is an unfair method of competition or that its prevention would be in the interest of the public.
>
> The orders complained of should be annulled and set aside. It is so ordered." (R. 1899.)

The judgment annulling and setting aside the orders of the Commission was entered on April 4, 1933 (R. 1899).

We are not content with the characterization of the opinion of the Circuit Court of Appeals as set forth in the

petition for certiorari and in the opening brief for the Federal Trade Commission. A brief review of the opinion of the court will be appropriate in order to make it clear that the court recognized the limits upon its reviewing jurisdiction and kept scrupulously within those limits.

Following a brief statement of the case and a summary of the elements of the law of unfair competition, conformably with the decisions of this court, the court recognizes that if the findings of the Commission are supported by the testimony, they are conclusive (R. 1890). The court proceeds to review the evidence of record in connection with the Commission's findings. It attaches significance to respondents' exhibit No. 31, "U. S. Department of Commerce, Bureau of Standards—Lumber—Simplified Practice Recommendation, R. 16-29," which approves "California White Pine" as a standard commercial name for this lumber (R. 1353, 1360-3). It is observed that while action by the Bureau of Standards is persuasive, "it is not necessarily controlling" (R. 1892). Reference is made to Bulletin 556 of the U. S. Department of Agriculture (respondents' exhibit No. 21—R. 779-780) reporting on the physical properties of *Pinus ponderosa* as compared with other pine lumbers, and the court notes that—

> "Expert witnesses from the U. S. Forest Products Laboratory place *ponderosa* in its mechanical properties with the typical white pine lumbers." (R. 1892.)

The court refers to the testimony given by the same experts of the U. S. Forest Products Laboratory at Madison, Wisconsin, directed to the durability of the several pine lumbers, showing in particular that there have been no

tests which can serve adequately to determine their relative decay-resisting qualities (R. 1894).

All of this evidence was material, particularly because it was supplied by unbiased government experts, and it was the duty of the court to give it consideration, *especially in view of the failure of the Commission to report it.*

Other evidence deemed material by the court was reviewed and pertinent decisions were considered. It is important to note, however, that the court did not "weigh the evidence," in the sense that it undertook to substitute its judgment for the judgment of the Commission as to the findings which should be made. *The court did not set aside a single evidentiary finding of the Commission.* It undertook to do no more than to exercise the reviewing authority expressly committed to it under the decisions of this court *(Federal Trade Commission v. Curtis Publishing Co.,* 260 U. S. 568; 43 Sup. Ct. Rep. 210; 67 L. Ed. 408).

THE ISSUES.

According to our view, the issues as framed in the brief for the Federal Trade Commission are largely misconceived. On our part we believe that the essential issue may be tersely and yet completely phrased in the following terms:

May the Federal Trade Commission competently suppress the use of a particular trade name as an "unfair method of competition in commerce":

(1) When there is neither proof nor finding that the use of the trade name is likely to result in "the destruction of competition or the restriction of it in a substantial degree";

(2) When it appears, and is admitted on the part of the Commission, that the trade name was not adopted "for the purpose of misleading or deceiving the trade or the public";

(3) When there is neither proof nor finding of intent to deceive or deception in fact;

(4) When there is neither proof nor finding that the name was adopted, or has at any time been used, for the purpose of trading upon another's name or for the purpose of destroying or injuring the business of a competitor;

(5) When it appears that the name is correctly descriptive of the properties and uses of the product and identifies the territory of its origin;

(6) When it appears that the name was adopted, and has been continuously used, for the purpose of avoiding confusion with other products having dissimilar properties and uses;

(7) When it appears, and without conflict, that the name came honestly into being and has been honestly used by respondents for upwards of 30 years in trade and industry throughout the United States.

In thus phrasing the issues we have kept strictly within the undisputed facts of record.

NATURE OF POWER ASSERTED BY FEDERAL TRADE COMMISSION.

The true nature of the power sought to be exercised by the Federal Trade Commission in these proceedings is aptly disclosed by the following excerpt from page 10 of the petition for certiorari in this cause:

> "In other words, does the Federal Trade Commission Act authorize the Commission, where a commercial name was originally adopted without improper motive or purpose, to compel use of more accurate and specific commercial names than those heretofore employed?"

This language reveals the Commission's preoccupation with trade nomenclature, irrespective of the law of unfair competition as commonly understood. It invites reference to the comment of the Circuit Court of Appeals for the Fourth Circuit in

> *Flynn & Emrich Co. v. Federal Trade Commission,* 52 Fed. (2d) 836, 838,

in which it was said:

> "It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce."

If the Commission may competently exercise as wide an authority as that here claimed, it is subject to no appreciable restraint in the arbitrary revision of trade nomenclature. We expect to show that the law of unfair competition which the Commission administers has no such scope.

SUMMARY OF ARGUMENT.

I. The trade-name "California White Pine" as applied to lumber yielded by *Pinus ponderosa* is truly descriptive of the physical properties, the commercial qualities and industrial utility of the lumber. The term has no botanical significance. Its use is therefore not misdescriptive.

The botanical classification of pine trees is not a criterion of the commercial nomenclature of pine lumbers. In classifying the several species of pines, the botanists have not considered either the mechanical properties, commercial qualities or the industrial utility of the lumber product. Purchasers and users of lumber have no interest in the botanical place of the tree which yields the lumber but are interested solely in the characteristics of the product itself.

Considered with respect to mechanical properties, commercial qualities and industrial utility, the lumber of *Pinus ponderosa* falls distinctly within the "white pine" group and is wholly dissimilar to the lumber of the so-called "yellow pines."

There are only two kinds of pine lumbers known to trade and industry, viz., "white pine" lumbers and "yellow pine" lumbers. "California White Pine" has always been considered a white pine in the trade.

The Federal Trade Commission has itself rejected botanical distinctions as criteria of commercial nomenclature (*In the Matter of the Gillespie Furniture Co.*, Docket 1739, order dated June 30, 1931).

No scientific tests have been made by which the relative durability of the several white pines of commerce can be ascertained.

The Circuit Court of Appeals properly gave consideration to the "Simplified Practice Recommendation" of the Bureau of Standards, United States Department of Commerce, adopting and recommending *"California White Pine"* as *preferred commercial name* for respondents' lumber. This was a "material fact not reported by the Commission." Action taken by the Bureau of Standards is persuasive and in some cases may be regarded as decisive *(Kirk & Co. v. Federal Trade Commission,* 50 Fed. (2d) 179).

The words "in the interest of the public," as used in the Federal Trade Commission Act, are not substantive words of jurisdiction but complementary words of limitation *(Federal Trade Commission v. Raladam Co.,* 283 U. S. 643; 75 L. Ed. 1324; 51 S. Ct. Rep. 587).

II. The commercial name "California White Pine" has neither been devised nor used for the purpose of misleading or deceiving the trade or the public.

Commercial names are addressed to trade and industry. "California White Pine" carries the representation that the lumber is a white pine lumber in mechanical properties and industrial uses. This is a truthful representation. A "yellow pine" name would be misdescriptive and misleading.

Respondents are entitled to a trade name which will place their lumber in one of the two groups of pine lumbers recognized by trade and industry. A white pine name appropriately characterizes this lumber in quality and utility.

III. "Unfair methods of competition" within the meaning and intendment of the Federal Trade Commission Act have not been established against the respondents upon the record or by the Commission's findings.

"Unfair methods" are "those resorted to for the purpose of destroying competition or eliminating a competitor or of introducing a monopoly—such as tend unfairly to destroy or injure the business of a competitor" *(Federal Trade Commission v. Raladam Co.,* supra).

There is neither charge nor proof of acts on the part of respondents tending to restrict competition or unfairly to destroy or injure the business of their competitors.

Fraudulent purpose and intent to deceive are indispensable elements of unfair competition *(Elgin National Watch Co. v. Illinois National Watch Co.,* 179 U. S. 665; *Howe Scale Co. v. Wyckoff, Seamans, etc.,* 198 U. S. 118; *Thum v. Dickinson,* 245 Fed. 609; *Wirfs v. Bosley Co.,* 20 Fed. (2d) 632; *Queen Mfg. Co. v. Ginsberg & Bros.,* 25 Fed. (2d) 284; *Vortex Mfg. Co. v. Ply-Rite Contracting Co.,* 33 Fed. (2d) 302).

IV. Neither fraud, dishonesty nor deception has been found against respondents. The decision of this court in *Federal Trade Commission v. Winsted Hosiery Co.,* 258 U. S. 483; 66 L. Ed. 729; 42 S. Ct. Rep. 384, is therefore inapposite.

V. The Commission exceeded its province in ordering a suppression of respondents' trade-name.

Trade-names which have been long in use constitute valuable business assets in the nature of good-will, the destruction of which should not be ordered if less drastic

means will accomplish the same result (*Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212; 77 L. Ed. 493; 53 S. Ct. Rep. 335; *Fluegelman & Co. v. Federal Trade Commission*, 37 Fed. (2d) 59; *Federal Trade Commission v. Cassoff*, 38 Fed. (2d) 790; *Federal Trade Commission v. Good-Grape Co.*, 45 Fed. (2d) 70).

VI. The public interest requirement has not been sustained of record.

The proceedings before the Commission arose out of a controversy essentially private in its nature. They are not founded upon a substantial public interest (*Federal Trade Commission v. Klesner*, 280 U. S. 19; 74 L. Ed. 131; 50 S. Ct. Rep. 5).

The comment of the lower court respecting the interest of the public in forest conservation was not a ground of the decision.

VII. The Circuit Court of Appeals made no independent appraisal of the evidence; neither did it reject any of the evidentiary findings made by the Commission.

The reviewing court has power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission (*Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568; 67 L. Ed. 408; 43 S. Ct. Rep. 210).

The court is not bound by the Commission's conclusions as to ultimate facts (*Temple Anthracite Coal Co. v. Federal Trade Commission*, 51 Fed. (2d) 656, 659; *Federal Trade Commission v. Curtis Publishing Company*, supra; *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291; 74 L. Ed. 431; 50 S. Ct. Rep. 89, 91).

ARGUMENT.

I.

THE TRADE-NAME "CALIFORNIA WHITE PINE" AS APPLIED TO LUMBER YIELDED BY PINUS PONDEROSA IS TRULY DESCRIPTIVE OF THE PHYSICAL PROPERTIES, THE COMMERCIAL QUALITIES AND INDUSTRIAL UTILITY OF THE LUMBER. THE TERM HAS NO BOTANICAL SIGNIFICANCE. ITS USE IS THEREFORE NOT MISDESCRIPTIVE.

Preliminarily we should note that the trade-name here under review is "California White Pine." These respondents have invariably sold and invoiced their lumber under that complete name, and not merely as "White Pine" without further word of identification, as the opposing brief would suggest.

The argument in behalf of the Commission perpetuates a confusion, initially tendered by the text of the complaints themselves, between the *botanical grouping of pine trees* and the *commercial grouping of pine lumbers*. The two groupings have nothing in common; one is not a criterion of the other. The botanical grouping of *pine trees* is responsive to plant characteristics. The commercial grouping of *pine lumbers* is responsive to mechanical properties and industrial utility.

It may be conceded that the tree *Pinus ponderosa* is commonly assigned by botanists to the group of *pine trees* popularly known as the "yellow pine group" but it does not follow that the lumber yielded by the tree must be assigned to the "yellow pine group" of *pine lumbers*. On the contrary the record shows that, in mechanical prop-

erties[1] and industrial utility, the lumber belongs in the white pine group and is far removed from the yellow pine group. To call this lumber by a *white pine name* is therefore neither false nor misdescriptive. Obversely, it would be misdescriptive to call this lumber by a *yellow pine name,* and counsel for the Federal Trade Commission has so argued.

(The opposing brief is in error in reciting that "The falsity of the description is generally acknowledged by respondents' witnesses." There has been no such admission.)

All of this is established without conflict of record, but apparently some exposition will be appropriate in order to preclude erroneous impressions.

Botanical Classification v. Commercial Nomenclature.

In classifying the several species of the *genus Pinus* botanists have commonly separated them into two main groups, the technically correct names for which are: (1) the "strobus group" and (2) the "pinaster group," each taking the name of its most important species (R. 1826). *In making this grouping, however, botanists did not and do not consider either the industrial utility, the mechanical properties or the commercial quality of the lumber produced from these trees.* These factors have been found to vary greatly, and to cut across rather than to run parallel

(1) We have reproduced in the Appendix certain charts (A to F, inclusive) based upon the laboratory tests made at the U. S. Forest Products Laboratory at Madison, Wisconsin (Respondents' Exhibits 21 and 22—R. 778-780, 783-4, 1368-9) showing graphically that in mechanical properties this lumber falls immediately within the white pine group.

with other plant factors (R. 1506-7, 1826, 1827-9, 1830). Their use as a basis of plant classification would not give scientifically dependable results, and botanists have therefore entirely disregarded them in their groupings. Instead, they have considered such non-variable characteristics as the nature of the reproductive organs of the plants in question, and, in the case of the pines, the structures of the cones, the arrangement of the needles, and to a minor degree the bark.[2]

By such methods, and considering these primary botanical characteristics only, botanists have arrived at the groupings above mentioned. So considered, and with no reference whatever to the commercial qualities, the industrial utility or the mechanical properties of the lumber produced from it, the tree *Pinus ponderosa* has been assigned botanically to the "pinaster" group of pines, to which the several species commonly known as the "southern yellow pines" also belong. Similarly, considering only

(2) At one stage of the proceedings before the Commission, counsel for the Commission insisted that "botanical distinction includes the quality of the wood product" (R. 1512). This was doubtless an inadvertence on his part, since the experts are agreed that botanical classification takes no account of wood quality (R. 707, 963, 1450, 1823, 1827, 1839-40, 1845) and is based primarily on the nature of the seeds, bark, needles and cones of the several trees (R. 962-3, 1366, 1387, 1822-3; Commission's finding No. 5, R. 28). It was because of the statement of counsel, above mentioned, that respondents determined to secure the testimony of Professor Jepson, of the University of California, and the highest authority on the trees of the Pacific Slope, who testified at length on this subject. It is clear that "wood quality" is not, and never has been, considered by botanists as a factor in either botanical classification or nomenclature. Respondents' Exhibits 21, 22, 23 and 32 (R. 778-784, 1368-9) disclose that *Pinus ponderosa* belongs distinctly in the "white pine" group when judged by its characteristics *as wood*.

their purely botanical characteristics, the trees *Pinus monticola* and *Pinus lambertiana* have been placed botanically in the so-called "strobus" group.[3]

It cannot be too strongly stressed that, in making their groupings, botanists have never considered and do not now consider either the commercial qualities, the industrial utility or the mechanical properties of the lumber produced from these several trees, and also that, when it is appraised with respect to these factors, the lumber of *Pinus ponderosa* which is marketed as "California White Pine" is found to fall distinctly within the so-called "white pine group," and to be almost wholly dissimilar in these respects to the lumber of the so-called "yellow pines." In this connection Prof. J. A. Newlin, an expert of the United States Forest Products Laboratory at Madison, Wisconsin, Engineer in Forest Products, in charge of timber tests, and co-author of official bulletins on the mechanical properties of woods grown in the United States, was questioned as follows:

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(3) The following testimony of the Commission's witness, Professor Koehler, of the United States Forest Products Laboratory, on cross-examination is illuminating:

> "Q. The most we can say is that certain of these pines have been conveniently grouped together and termed members of the white pine group and others have been grouped together for convenience and termed members of the yellow pine group. Is that a fair statement?
> A. Yes." (R. 706.)

The witness added that the distinguishing characteristics are certain microscopic cell indentations in the "yellow pines" and certain other differences such as the number of needles in a "bundle". But he was emphatic to the effect that the mechanical properties of the woods of these trees are not considered at all in determining their classification, "because they vary and overlap". (R. 707.)

"Q. Is it a fair summary or characterization of these tests that the mechanical properties of *Pinus ponderosa* as disclosed by the data in these tables more closely resemble the mechanical properties of the white pines, botanically speaking, than the southern yellow pines?

A. Yes, sir.

Q. Let us assume for the moment, Professor Newlin, that we are making one group of the three true white pines as they have been termed, botanically speaking, namely the *Pinus strobus,* the *Pinus monticola,* and the *Pinus lambertiana.* Then we make a second group of the three leading Southern yellow pines, namely the *Pinus palustris, Pinus echinata,* and the *Pinus taeda.* We now address ourselves to the consideration of the mechanical properties of the *Pinus ponderosa* in comparison to the relation of the mechanical properties of the white pines and yellow pines to which I refer. Now, considering the mechanical properties alone, would you again say that *Pinus ponderosa* is more directly to be assimilated to the white pine group than to the Southern yellow pine group?

A. The *Pinus ponderosa* in its mechanical properties more properly belong(s) in with the white pines than with the Southern yellow pine group, that is, it is much closer in its mechanical properties to that group." (R. 778-779.)

Another recognized authority on wood technology and nomenclature, Prof. T. J. Starker, of the Oregon State College, succinctly stated the situation:

"Q. In relation to the comparative mechanical properties of the wood, does the lumber yielded by the

> *Pinus ponderosa* tree belong more appropriately in the white pine group or the yellow pine group?
>
> A. These mechanical properties of *Pinus ponderosa*—in every test it falls within the limits set by the white pine group, and is very far removed from the average of the yellow pine." (R. 1368-9.)[4]

When the Commission's findings speak of "genuine" or "true" white pine, therefore, they should be understood as speaking of *a technical botanical relationship, wholly apart and distinct from the commercial quality and industrial utility of the lumber yielded by the several trees.* It is on the latter basis, however, that the propriety of accepted commercial names must, of course, be judged, as the Commission itself at length impliedly conceded. When judged on that basis "California White Pine" is in every essential respect a "white pine" and is properly so designated in commerce. As one Commission witness succinctly declared:

> "* * * when you come right down to it, basically speaking, there are only two kinds of pine, white pine and yellow pine, that are known in the lumber business, and that" (California White Pine) "is not a yellow pine; it is considered as a white pine in the trade." (R. 282.)

The opposing argument apparently suggests that the respondents have represented their lumber to be so-called "true white pine." There has been no such representation.

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(4) The tests of the United States Forest Products Laboratory at Madison, Wisconsin, show distinctly that in its mechanical properties this lumber fits *within the limits* set by the other "white pines" of commerce. (Respondents' Exhibits 21, 22, 23 and 32; Record, 779, 794, 812, 1368-9, 1374, 1408, 1410.)

The Commission's findings expressly acquit respondents of that charge. We quote the concluding sentence of Paragraph twenty-nine of the Commission's findings (R. 33):

> *"Nor have these producers supported their designation of ponderosa products by terms which include the phrase 'white pine' by express declarations to their customers that said products are true white pine."* (Emphasis supplied.)

There has been no representation that "California White Pine" is botanically anything which it is not. The record in these proceedings contains no evidence of even a single instance of a sale of this lumber by any of the respondents under the claim, declaration or imputation that it is produced from a tree *botanically* classified in the same group of pine species to which *Pinus strobus, Pinus monticola* and *Pinus lambertiana* are assigned by botanists. Furthermore, there is no evidence in this record that these respondents or any of them have at any time or in any instance whatsoever either "been enabled to fill" or have actually filled orders (or, even a single order) for "genuine white pine" with *ponderosa* pine. In point of fact, there is no evidence that any lumber producers or lumber merchants, whether privy to these respondents or not, have been supplying this lumber upon orders for so-called "genuine white pine" or upon orders for "Northern White Pine," "Idaho White Pine" or "Sugar Pine."

The lumber of *Pinus ponderosa* which is marketed as "California White Pine" fell naturally and honestly by its commercial name. Those who originally adopted that designation were not only unfamiliar with technical botan-

ical distinctions, but had in mind solely the practical necessity, in the interest of the lumber-consuming public, of distinguishing this lumber from the totally different lumber produced from the "yellow pines" of the south.

The facts respecting the origin of the term "California White Pine" were brought out by the Commission's witness Cox, who though hostile to the respondents stood firmly upon the ground that the name was adopted in order to distinguish this lumber from that of Southern Yellow Pine. We quote from page 1206 of the record:

"By Mr. Burr:

Q. What were the reasons for the change?

A. The name was adopted to distinguish it from Southern pine or yellow pine.

Q. Yes.

A. It wasn't called yellow pine because it was different. If we called it yellow pine we thought that it would be mixed or confused with the product of the south.

Q. Well, why call it white?

A. I don't know—just because it was whiter than yellow pine, that was all."

Even when the Commission's counsel resorted to leading and suggestive questions, the testimony of the witness was not modified. We quote further from page 1206 of the record:

"By Mr. Burr:

Q. Are you sure that in the debate there was no other reason given for the use of the word white in connection with it?

A. That is my memory."

The Commission's witness, Frederick Weyerhaeuser, an official of one of the largest lumber producing and marketing organizations in the United States, in response to a question as to why his company had originally adopted the name "Western Soft Pine" for *Pinus ponderosa* lumber produced by it in the "Inland Empire" region, testified:

> "We thought it was desirable to give it a name different from the yellow pine of the south, as it was a soft wood." (R. 1273.)

Again the witness Weyerhaeuser, when asked whether or not "California White Pine" lumber and longleaf yellow pine from the south are in competition, said:

> "They are not very active competitors, one wood being rather the complement of the other, for many uses." (R. 1507.)

That this distinction is an important one in commerce is shown by the fact that counsel for the Commission himself declared in his brief before the Commission that to call this lumber by any commercial name containing the word "yellow" would be a "wrong" and would cause confusion (Par. 100). He had previously so stated at the hearings (R. 967, 1402). From every practical viewpoint this lumber belongs exactly where the commercial practice of the lumber trade for the past thirty years has placed it, to-wit, along with the other pine lumbers that are soft and white and are used for finish as contrasted with structural purposes. This has been a natural grouping, and

there is not now and never has been any question of an intent to "trade on another's name."[5]

Under whatever name it were to be marketed, it is admitted that this wood must go into these general "white pine" uses.

Indeed, the technical, botanical relationships of wood used for lumber are not ordinarily significant when their commercial names are under consideration, and the failure of the practical lumber merchant in this instance to follow such distinctions is neither unique nor unusual. For example, the well-known lumber commonly marketed throughout the country as "Douglas Fir" is not produced from a tree which is botanically a fir tree, but from a tree which is neither fir, spruce nor pine but which botanists have classified as "Pseudotsuga" (literally "false hemlock"). For many years this wood was also marketed as "Oregon Pine," and this is still its standard commercial name in California and in the export trade.[6]

Again, no species of tree which is botanically a "cedar" grows in the United States, yet the lumber of several trees

(5) As we have already stated, the charge of "trading on another's name" has been withdrawn. This was necessary, as the Commission was unable to prove a single instance of any such action. Not only was the origin of the name "California White Pine" free from such taint, but its use has likewise been universally free from any such purpose.

(6) The Record contains much testimony respecting the non-botanical commercial names for the lumber known to the trade as "Douglas Fir" and "Oregon Pine". (R. 843-4, 961, 964, 1028, 1093-4, 1128, 1129, 1201, 1231-2, 1380, 1498-1501, 1504, and Respondents' Exhibit 31, R. 1360-3.) "True" botanical "fir" is produced and marketed in large quantities (R. 964-5) and is used for many purposes for which "Douglas Fir" is unsuitable or distinctly inferior. (R. 1129.)

of other botanical *genera* is commonly advertised and marketed as "cedar." Thus the well-known "Port Orford Cedar" is not botanically a cedar (R. 965-6, 1129-30, 1160-1, 1502).

Moreover, by a recent decision, the Federal Trade Commission has itself rejected botanical distinctions (of much greater technical extent than those here involved) as criteria of commercial nomenclature. We refer to the so-called second "Philippine Mahogany" decision, by which the use of that term in commerce for woods not belonging even to the botanical family of "genuine" mahogany is held to be proper and not to constitute an "unfair method in commerce," thus reversing a previous decision which had condemned the use of that term as misleading *(In the Matter of the Gillespie Furniture Co.,* Docket 1739, order dated June 30, 1931). Furthermore, the so-called "longleaf pine" lumber of the south may be and often is the product of any one of the three main southern pines, the distinction being the appearance and utility of the particular piece of wood rather than the botany of the tree from which it was cut. This is also true of the "shortleaf pine" lumber of the south, which may in practice come in part from the tree *Pinus palustris,* commonly known as "longleaf pine." In other words its utility and adaptability are considered in commerce rather than its botany (R. 120, 162-3, 1139, 1380).

This list might be greatly enlarged, the fact being that commerce and industry have taken little account of the purely botanical distinctions between various trees. The controlling considerations in commerce and industry are

the mechanical properties and the quality and utility of the lumber rather than the number of needles in a "bundle," the character of the bark or cones or the nature of the flowering organs.

It was stipulated by the Commission's counsel in this connection that purchasers and users of lumber are neither familiar with nor concerned with botanical classification, nomenclature or relationship (R. 919-20), and that their primary concern is with its quality, mechanical characteristics and industrial utility (R. 873; see also R. 78, 270, 279, 375, 388, 389, 508, 550, 555 and 570).

The Commission's witness Greeley declared:

> "I think the actual characteristics and similarities of the wood is a more important factor in commercial practice than botanical distinctions." (R. 1143.)

He also stated:

> "I can readily see from the standpoint of the manufacturer, and the standpoint of the trade, logical commercial reasons for making clear that the lumber of *ponderosa* is in no wise confused with lumber of southern yellow pine.
>
> Q. And does this also go to the standpoint of the consumer?
>
> A. Yes." (R. 1121.)

The record shows overwhelmingly that purchasers and users of lumber have no interest in the botanical place of the tree which yields the lumber, but that they are interested solely in the characteristics of the lumber itself. We

close this phase of the discussion by reproducing the concluding sentences of Paragraph sixty-two of the Commission's findings (R. 39):

> "Nor are these classes of buyers informed of or concerned over the purely botanical distinctions considered by scientists in the classification of species. They buy by common names and are concerned over distinction between the characteristics of the lumber of the various species."

These findings should suffice. Botanical terms and botanical identities hold no interest either for the practical lumberman, the lumber merchant, the architect or the consumer.

The Federal Trade Commission is concerned solely with trade practices in commerce and industry, and in commerce and industry the term "white pine" has never possessed any technical significance of a botanical character.[7] As the

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(7) The use of the term "white pine" as the "common name" of the tree *Pinus strobus* and certain related species is of no import. The record is clear to the effect that so-called "common names" of plants are not words of science. Neither do they possess botanical significance. They are merely convenient and frequently arbitrary nicknames of a purely colloquial rather than scientific character. They are never used by botanists in an exact sense, but are included in botanical literature purely as an aid to popular description, either because exact translation of the botanical title is impossible or impracticable, or because that title is too cumbersome for popular use. (R. 964, 1131-2, 1367, 1383-4, 1830-1, 1837.) Professor Cheney of Minnesota, a Commission witness, had the following to say on this subject:

"Q. Why are common names adopted by botanists?
A. I do not think they are.
Q. They are not?
A. They are adopted by other people.

wood of *Pinus strobus* has become scarcer this term has quite naturally attained a broader significance wholly apart from botany.[8] Both "Idaho White Pine" and "California White Pine" have been terms in common use for a long period of years, while "Sugar Pine" has never been marketed as "White Pine." The lumber sold as "California White Pine" came into the markets of the east and middle west along with, if not slightly earlier than, "Idaho

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Q. Then they are really not, technically not correct, at all, are they?

A. No." (R. 964.)

Such common names possess no relation to the lumber cut from any tree, nor to its botany. (R. 1338, 1372-3, 1446-7, 1830-1.) The common names "white pine" and "yellow pine" are of such character. Neither is descriptive of the trees in the forest, and "white pine" trees are not white. The term possesses meaning only to distinguish the *wood* cut from them from that of the so-called "Southern yellow pines." On this basis the lumber of *Pinus ponderosa* is fully entitled to the term "white," since it is not at all to be assimilated to the "yellow" pines, and is frequently lighter in color than that of the other "white pines" of commerce. (R. 1367.) The Forestry Department's term "Western Yellow Pine" for *Pinus ponderosa* is not a "common name" at all, but was arbitrarily adopted for convenience in referring to that tree at a time *after* its lumber had been for many years sold as "California White Pine." It bears no relation to the color, quality, mechanical characteristics or utility of this truly "white pine" lumber.

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(8) For at least thirty years the term "white pine" has not been confined in the lumber trade to lumber produced solely from trees to which the term was also applied colloquially (R. 213, 923-4, 1812), and during that period the term has been undergoing a broadening of meaning (R. 330, 505-6, 752-3), until it has come to signify pine lumber of the soft or finish type as distinguished from the structural pine lumber of the "yellow pines" of the south. (R. 557-8, 589-90, 1400.)

White Pine" and "Sugar Pine";[9] it possesses the industrial characteristics and utility of the old so-called "white pine," and is wholly dissimilar in its qualities and uses to the lumber of the so-called "yellow pines." It has never been, and admittedly should not be, marketed as "yellow pine." *In its mechanical properties it falls distinctly within the class of the so-called "white pines,"* as is clearly disclosed by the unanimous testimony of the experts.

Doubtless enough has been said to reveal the error inherent in the attempted assimilation of *botanical classification of pine trees* to *commercial grouping of pine lumbers.* The former relates to the pines as *trees;* the latter relates to *pine lumbers.* The two groupings have distinctive meaning and purpose, and have never been in conformity. To our minds the persistent confusion exhibited by the opposing brief in dealing with the incidents of botanical classification and commercial nomenclature, respectively, is gratuitously unnecessary.

The Circuit Court of Appeals properly gave consideration to the "Simplified Practice Recommendation" of the Bureau of Standards, U. S. Department of Commerce, adopting and recommending "California White Pine" as a PRFERRED COMMERCIAL NAME for respondents' lumber. This was a "material fact not reported by the Commission."

The brief for the Federal Trade Commission finds error

(9) "Idaho White Pine" came on the market of the United States at approximately the same time as, or a little later than, "California White Pine." (R. 664, 932, 1270, 1272-3, 1485-6, 1570-1.) Sugar Pine and "California White Pine" have been marketed under those distinctive trade names throughout their history in the lumber markets. Sugar Pine has never been marketed under any other name, and has never been known in the lumber trade by any name containing the word "white."

in the consideration given by the Circuit Court of Appeals to the Simplified Practice Recommendation of the Bureau of Standards, United States Department of Commerce, adopting and recommending "California White Pine" as a preferred commercial name for lumber yielded by *Pinus ponderosa*. (The second specification of error recites that the court erred "in weighing the evidentiary value of nomenclature approved by the Bureau of Standards.") The court committed no error in this respect but kept expressly within its reviewing jurisdiction as defined by this court.

In the proceedings before the Federal Trade Commission these respondents offered in evidence a copy of a bulletin of the Bureau of Standards, United States Department of Commerce, captioned "Lumber, 4th Edition, Simplified Practice Recommendation R. 16-29," dated July 1, 1929. This was received in evidence as respondents' Exhibit No. 31 (R. 1353, 1360-1363). This bulletin carries various recommendations under the caption "American Lumber Standards," and sets forth in particular that the commercial name "California White Pine" is a preferred name for lumber yielded by *Pinus ponderosa* (R. 1361). The bulletin was tendered and received for that specific purpose.

Certainly this was material evidence. It had a bearing both upon the issue of unfair competition and the issue of the public interest. If any administrative agency of the federal government such as the Bureau of Standards, attempting to bring about uniform and simplified practices in trade and industry, recommends specific trade nomenclature as "preferred," surely that recommendation is

significant of a conviction that the recommended trade-name is neither deceptive nor misleading nor confusing, nor opposed to the public interest. The bulletin was received in evidence. But the Federal Trade Commission made no reference to the bulletin, or to the simplified practice recommendation as to "California White Pine," in its findings in these proceedings. This was a material fact, not reported by the Commission, and this court has held that the reviewing court has "power to examine the whole record" and to ascertain for itself "whether there are material facts not reported by the Commission." The following is quoted from the opinion of this court in

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210, 213, 67 L. Ed. 408:

"Manifestly, the court must inquire whether the commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, *the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the commission.* If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the

court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act." (Emphasis supplied.)

It will be found upon examining the opinion of the Circuit Court of Appeals in this cause that the consideration given to the simplified practice recommendation of the Bureau of Standards is within the limits of the reviewing jurisdiction as defined by this court (R. 1891, 1892). It has reported a material fact which was not reported by the Commission. But the court has been particular to say that while action by the Bureau of Standards is persuasive, it is not necessarily controlling on the Federal Trade Commission or the courts. We quote from the opinion of the court below (R. 1892):

"While action taken by the Bureau of Standards is persuasive in a case of this character, it is not necessarily controlling on the Federal Trade Commission or the courts. There may be cases in which the action of the Bureau should be regarded as decisive. As said by the Circuit Court of Appeals, Seventh Circuit, in a recent case, Kirk & Co. v. Fed. Trade Comm., 59 F. (2d) 179, 183:

" 'We deem it quite pertinent and decisive of the question before us. The Government, through its agency, the Bureau of Standards, has thus committed itself to the proposition that castile soap may be made of oily and fatty elements other than olive oil. Being solely a question of fact, we deem it expedient for other departments of the Government, including the judiciary, to

accept such construction, if for no other reason than that of consistency.'

"It would not necessarily follow from this decision that a yellow pine might be sold as a white pine if such sales were unfair to the trade and injurious to the public, notwithstanding the Bureau of Standards had specified a name such as 'California white pine' in a list of 'Standard commercial names' for pine lumber. It would be different, however, if the particular lumber sold under such name possessed substantially the same qualities possessed by the white pines of commerce as distinguished from certain well-known commercial yellow pines."

The case of *Kirk & Co. v. Federal Trade Commission,* supra, cited in the opinion of the court below, seems to be directly pertinent. It appeared in that proceeding that the Bureau of Standards had prescribed rules as to what should constitute castile soap. The Federal Trade Commission ignored this material fact, and its order was set aside by the Circuit Court of Appeals of the Seventh Circuit. Certiorari was denied by this court on December 5, 1932 (287 U. S. 663, 53 S. Ct. Rep. 220, 77 L. Ed. 238).

These respondents do not contend, as the opposing argument may imply, that the functions of the Bureau of Standards "overlap or supersede the functions of trade regulation." We do contend, however, that irrespective of the precise legal aspects of the functions exercised by the Bureau of Standards, the adoption of "California White Pine" as a preferred commercial name by the bureau was a material piece of evidence upon which findings should properly have been made by the Commission. Since

the Circuit Court of Appeals has "*power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission,*" the court below did not exceed its powers in taking cognizance of this material fact in its efforts to determine whether the entire record could support the Commission's findings that respondents were guilty of unfair methods of competition.

Alleged differences between ponderosa and other pine lumbers.

As the brief for the Commission would have it, these respondents are attempting to excuse terminology which is "false technically" upon the plea that they are offering "an exactly similar article or one equally as good." This is an erroneous characterization of respondents' position, and alike of the opinion of the court. We contend that the term "California White Pine" is technically correct as applied to the lumber yielded by *Pinus ponderosa* because it properly characterizes its physical properties and industrial uses. The term has no botanical connotation.

We deny misdescription. Again pointing out that there are but two groups of pine lumbers known to trade and industry, viz: the white pine lumbers and the yellow pine lumbers, our task is to determine in which group this lumber appropriately falls. To our minds this is the controlling question. Applying the dual test of "mechanical properties" and "industrial utility," we find that the lumber of *Pinus ponderosa* belongs definitely within the white pine group and not within the yellow pine group. The record will admit of no other conclusion. Therefore

this lumber is entitled to a white pine name. "California" is added for specific identification.

Refined argument respecting the relative merits of competing lumbers would seem to lend little assistance toward a determination of the real issues here presented. In many particulars, as it seems to us, the opposing brief is careless of the record, but we shall not devote space to correction. Admittedly the lumber market is highly competitive and the numerous witnesses called by the Commission and by the respondents had their several preferences and prejudices. The prevailing fact, however, is that *no evidence has been offered remotely suggesting that this lumber belongs in the yellow pine group or that it should have a yellow pine name.*

We find an apparent suggestion in the opposing brief that since this lumber is yielded by a tree which has been assigned botanically to the yellow pine group, the lumber should bear a yellow pine name. Such at least is the implication conveyed by the brief for the Federal Trade Commission. However, it should be made clear to the Court that the Commission is opposed with equal vigor to a yellow pine name for this product. This is apparent from the record declaration of counsel for the Federal Trade Commission which we here reproduce (R. 165):

> *"Now, then, I do not believe that these gentlemen should be required to call their product western yellow pine. The Government has not taken one step or made one single attempt to introduce evidence in this case which could be construed as forcing or attempting to force the Pinus ponderosa interests to call*

their product western yellow pine or anything else with the name 'yellow pine' in it.

I should be opposed to such an order."

In brief, the argument seems to be that although *ponderosa* is assigned botanically to the yellow pine group of trees, *the lumber cannot be called yellow;* and although the properties of the lumber place it in the white pine group, *it cannot be called white.* The vagaries of administrative regulation could not be more vividly exemplified.

Particular differences in quality, utility, durability or any other characteristic need not engage us, except to say that the witnesses were not in accord. This is sufficiently shown by the findings of the Commission. We think, however, that the court should know that the only expert testimony received of record respecting relative durability—*a point strongly stressed in the Commission's findings and urged with equal ardor in the Commission's brief*—completely fails to sustain the Commission's findings of relative inferiority for this lumber.

The experts of the United States Forest Products Laboratory at Madison, Wisconsin, testified without exception that *no scientific tests have ever been made by which the actual relative durability of these several white pines of commerce can be ascertained.* Typical of the expert testimony on this subject was that of Professor G. M. Hunt, of the United States Forest Products Laboratory. When asked whether there have been any tests which in his opinion are adequate to enable him to advise with assurance as to the relative decay resisting qualities

of the heartwood of *Pinus lambertiana* and the heartwood of *Pinus ponderosa,* he said:

"A. There have been no tests which we consider adequate to settle the question of comparative decay resisting properties of those two woods.

Q. Have there been such tests as will enable you to advise with assurance as to the relative decay resisting qualities of the heartwood of pinus ponderosa and pinus monticola?

A. There have been no tests to settle that question.

Q. Have there been tests which will adequately settle the question as to the relative decay resisting qualities of the heartwood of pinus ponderosa and the heartwood of pinus strobus?

A. There have not." (R. 821.)

The same witness also stated:

"Q. In this matter of durability do you know of any tests that have been attempted which would show a comparison between the durability of the white pines and pinus ponderosa?

A. No." (R. 816.)

In the interest of completeness we add the testimony of Professor C. P. Winslow, Director of the United States Forest Products Laboratory since 1917. Professor Winslow was called as a witness for the Commission. We quote from page 820 of the record:

"Q. (By Mr. Burr) What is the difference between white pine and pinus ponderosa as to durability?

A. I don't know."

As to alleged wood failures, they were not satisfactorily identified as *Pinus ponderosa,* and Professor Koehler of the Forest Products Laboratory, a witness for the Commission, and an authority on wood technology and identification, explicitly stated that the samples submitted to him were for the most part too small to admit of absolute identification. They were "yellow pine", but the species could not be determined with certainty (R. 698, 699-700, 706).

This evidence was material, in the view of the Commission, and yet the Commission ignored it in its findings. It preferred to rest its findings upon lay testimony based upon individual preference, prejudice and repute. The failure of the Commission to report the testimony of the government experts again exemplifies the omission of material facts. Under the ruling of this court in *Federal Trade Commission v. Curtis Publishing Company,* supra, it was within the province of the lower court to take note of this omission. This the court did, with appropriate quotations from the testimony. (R. 1894.)

The Commission has again been unfair in making findings respecting relative heartwood and sapwood content which are wholly without support of record. We refer to paragraph 40 which contains the following statement (R. 35):

> "The ponderosa pine has on an average a far greater amount of sapwood than trees generally used for lumber."

This statement is wholly devoid of record support, and counsel for the Commission so admitted in oral argument

before the Circuit Court of Appeals. We assume that the same admission is in order now.

The court below comments upon this paragraph of the findings in its opinion (R. 1896). Again the court was within its proper province.

It was apparently found necessary to traduce the qualities of this lumber in order to find some occasion for condemning this long established trade name. If the findings were valid they could not serve, as we understand the law, to make out a case of unfair competition. Be the facts what they may as to the precise relative merits of these several competing lumbers, it is certain that neither the record nor the findings can justly deny to these respondents their right to use a white pine name with an appropriate term of identification, i. e., "California White Pine".

The current meaning of "white pine."

The fact may be conceded that, many years ago, "white pine" meant lumber yielded by *Pinus strobus* only. It has long ceased to have that restricted meaning. For example, "Idaho White Pine" has been known by that name for some 30 years, although the lumber is not yielded by *Pinus strobus*. "California White Pine" has been known by that name for more than 30 years throughout the United States and for practically a half century in the Pacific coastal area, although it is not yielded by a botanical white pine.

This extension of the original meaning to include lumbers other than those yielded by *Pinus strobus* has

been a natural transition and in no respect responsive to improper motive or purpose. Today "white pine" means any one of several lumbers of the finish type, as distinguished from the structural type, and with an appropriate prefix such as "Northern", "Idaho", and "California" in the interest of specific identification. Trade and industry have been completely adjusted to this prevailing nomenclature.[10]

Usage, intent and purpose.

The brief for the Commission observes that this proceeding is not brought by private parties but is brought by a governmental agency and "in the interest of the public". The Commission, however, overlooks the fact that these words, "in the interest of the public", are *"not substantive words of jurisdiction, but complementary words of limitation"*.

This Court so held in

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 649; 51 Sup. Ct. Rep. 587; 75 L. Ed. 1324.

In brief, the phrase "in the interest of the public" added nothing to the law of unfair competition. Unfair competition must first appear, and even then the Commission cannot proceed unless it further appears that its pro-

(10) That "white pine" cannot mean *strobus* only is attested by the fact that the proceedings before the Commission were avowedly brought in behalf of three distinct lumbers, viz., "Northern White Pine", "Idaho White Pine" and "Sugar Pine". As previously noted, the latter wood has never been marketed under a white pine name although it is yielded by a tree assigned by botanists to the white pine group.

ceeding is "in the interest of the public." The preexisting law of unfair competition itself has not been changed.

The Commission now represents upon brief that there is "ample testimony to show improper motive as well as deliberate deception" (Brief for Commission, p. 33). This we deny. There is neither testimony nor finding to such effect. Counsel for the Commission made the following express admission upon page 87 of his brief filed before that body in these proceedings:

> "There is no proof that the practice of designating *ponderosa* by terms including the word 'white' was adopted for the purpose of misleading or deceiving the trade or the public."

That admission was compelled by the record.

It is also suggested in the brief for the Commission that respondents' "present intent" is wrongful (Brief for Commission, p. 34). In short, since respondents defend their well-established trade name in the belief that it has monetary value, since they state that this name "classifies our woods with the other woods that have been known to the trade, including itself, as white pine" (R. 1551-2), an improper motive may be ascribed to them. An argument so strained, and so patently unfair, will not require extended answer. Suffice it to say that the use of a trade name which places this lumber where it clearly belongs by virtue of its mechanical properties and industrial utility—i. e., in the white pine group of lumbers—proceeds from a proper motive. Resistance to change to the Latin terminology employed by botanists is equally free from any sinister aspect.

The case of

Straus v. Notaseme Co., 240 U. S. 179, 60 L. Ed. 590, 36 S. Ct. Rep. 288,

holds nothing in common with the instant case, for there the offending manufacturer undertook to retain a trade design originated by a competitor after he was put on notice of the competitor's priority of right. These respondents are not chargeable with the simulation or use of a rival's trade name or device.

The Commission has made no findings of improper motive either in the adoption or in the retention of this trade name. *It has made no findings of deception on the part of these respondents in the use of this trade name in all of the eighty paragraphs of its findings.* (R. 28-43.)

In its petition for certiorari in this cause the Commission tendered issue in the following terms:

> "In other words, does the Federal Trade Commission Act authorize the Commission, *where a commercial name was originally adopted without improper motive or purpose,* to compel use of more accurate and specific commercial names than those heretofore employed." (Petition for certiorari, p. 10.)

This is not only a complete acquittance of improper motive or purpose on the part of the respondent lumber companies in the adoption of their trade name, but it reveals the extravagant nature of the power which the Commission seeks to exercise over commercial nomenclature.

The decision of this court in

Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483; 66 L. Ed. 729; 42 S. Ct. Rep. 384,

is far from apposite. There the offending manufacturer had, with deliberate intent to deceive, misbranded his wares. He had knowingly resorted to false and misleading labels, to the injury of honest manufacturers and the consuming public. This is not such a case, as we shall show in a later portion of this argument.

It is enough here to point out that the test of "usage, intent and purpose" is wholly favorable to these respondents. "Usage", throughout all the years during which this lumber has been known, assigns it to the white pine lumbers and accords to it a white pine name. "Intent and purpose", by the consensus of the testimony, are to identify its properties and uses and to avoid confusion with the "yellow pine" lumbers, from which it is far removed in appearance, quality and essential industrial utility.

The element of competition.

We are at a loss to understand the occasion for the discussion of competition in the brief for the Federal Trade Commission. The existence of competition between California White Pine and other lumbers entering into the so-called white pine uses has at all times been conceded. The court below expressly recognized in its opinion that the use of this trade name is a method of competition in commerce (R. 1890). No controversy exists on this point.

II.

THE COMMERCIAL NAME "CALIFORNIA WHITE PINE" HAS NEITHER BEEN DEVISED NOR USED FOR THE PURPOSE OF MISLEADING OR DECEIVING THE TRADE OR THE PUBLIC.

We have heretofore noted the admission of counsel for the Commission that there is no evidence showing that "California White Pine" was adopted for the purpose of misleading or deceiving the trade or the public. We add that it has never been used by respondents for that purpose or with that effect.

There is no evidence, nor any finding, that any respondent has ever sold or invoiced this lumber under any other term than the full name "California White Pine" (see Paragraph three of findings—R. 28).

There is no evidence that any respondent, or any person in privity with a respondent or otherwise, has at any time sold this lumber in response to an order for so-called botanical "white pine".

There is no evidence that any respondent, or any other person in trade or industry, has at any time represented this lumber to be a botanical "white pine".

Keeping in mind that the botanical classification and nomenclature of *pine trees* do not run parallel with the commercial classification and nomenclature of *pine lumbers*, it is not difficult to meet the persistent argument of "misdescription".

The term "California White Pine" conveys no botanical implications. It is not a representation that the lumber is

yielded by a tree which has been placed by botanists in the group popularly known as white pine trees. Commercial names are addressed to trade and industry, i. e., to the purchasers and users of the product. "California White Pine" is such a commercial name and carries the representation that the lumber is a white pine lumber in mechanical properties and in industrial uses. This is a truthful representation. It is in no sense misdescriptive.

Obversely, the name "California White Pine" suggests that the lumber is not a yellow pine lumber in mechanical properties and industrial uses. This again is a truthful representation.

The fact is that the entire argument of "misdescription", "false labelling" and "misbranding" is predicated upon a premise which is false in fact. That premise is that "California White Pine" carries an implied representation that the lumber comes from a *botanical* white pine tree. Since such is not the representation, either express or implied, the premise is false and the claim of misdescription fails.

Trade and industry know little and care less about botanical classification. This is the consensus of the testimony and is attested by the Commission's findings (Commission's findings, paragraph sixty-two, R. 39).

The architect witnesses were agreed that their interest is not in the botanical identity of the tree which yields the lumber; rather their interest is in quality and utility (R. 78, 677-8). It is inconceivable that the consumer is interested in botanical nomenclature. The Commission has found to the contrary (R. 39).

Indeed, until this trade name lately became the subject of agitation, it is certain that neither the lumber industry nor the lumber users exhibited any concern either with the botanical names or the classification of trees. Their concern was with the lumber itself—its mechanical properties, qualities and industrial uses.

A like fallacy underlies the argument directed to "confusion". The alleged "confusion" has been largely engendered by the proponents of a change in trade-name, and that confusion is mainly unfamiliarity with the botanical place of the several pine trees which yield commercial lumber. Whether this be termed "confusion" or more exactly "ignorance", it is not truly attributable to the use of this commercial name nor would it be remedied by a change in the name.

How could "ponderosa" (or "pondosa", the name favored by our adversaries) assist trade or industry toward a knowledge of the place occupied by this lumber, either botanically or industrially? It suggests neither white pine nor yellow pine. It would not remove such confusion as exists; it would not be a cure for ignorance, nor would it obviate misleading practices.

As far as the supposed competitive difficulties which confront other lumbers are concerned, it is enough to say that these difficulties simply evidence the normal rivalry between lumbers which are sold and used for a common purpose. These competitive conditions will of course persist irrespective of trade nomenclature.

The plain fact is that these lumber manufacturers are rightfully entitled to a trade name which will place their

lumber in one of the two groups of pine lumbers recognized by trade and industry. A yellow pine name is forbidden, because this would be misdescriptive, misleading and confusing in the highest degree. A white pine name is appropriately indicated because this places the lumber in the group where it belongs in physical properties, essential quality and industrial utility.

Surely these respondents should not be forbidden to use either a white pine or a yellow pine name and be relegated to the use of a nondescript Latin term, as the Federal Trade Commission seems to desire.

It should be noted that the findings of confusion are quite wanting in concreteness. There are these significant deficiencies:

(1) No wholesale or retail dealer has testified that the name "California White Pine" has induced him to buy lumber which otherwise he would not have purchased.

(2) No user or consumer has testified that the name has caused him to use this lumber when he did not desire it.

(3) No architect has testified that he has been misled into specifying "California White Pine" when, without that name, he would have specified some other lumber.

The evidence and alike the findings do not reveal deception in fact. A careful scrutiny of the Commission's report will show that there is no finding of deception, nor any other finding reflecting adversely upon the honesty or good faith of these respondents.

III.

"UNFAIR METHODS OF COMPETITION" WITHIN THE MEANING AND INTENDMENT OF THE FEDERAL TRADE COMMISSION ACT HAVE NOT BEEN ESTABLISHED AGAINST THE RESPONDENTS UPON THE RECORD OR BY THE COMMISSION'S FINDINGS.

A. "The paramount aim of the Act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree."

B. "Unfair methods" are "those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing a monopoly—such as tend unfairly to destroy or injure the business of a competitor."

C. "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

In the interest of precision we have couched the foregoing propositions of law in the authoritative language of this court, excerpted from the opinion in

Federal Trade Commission v. Raladam Co., supra.

This decision served clearly to define the limits of the jurisdiction conferred upon the Federal Trade Commission by the Federal Trade Commission Act. Little doubt can now exist as to the nature and purpose of the administrative power granted to the Commission.

The following excerpt from the opinion of the court (pp. 647-648) establishes beyond question that the pur-

pose of the statute is to enforce by administration the prohibitions of the Sherman Act and the Clayton Act:

> "In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair', and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein'. The paramount aim of the Act is the protection of the public from the evils likely to result from *the destruction of competition or the restriction of it in a substantial degree,* * * *." (Emphasis supplied.)

The court also inquired into the genesis of the statute and set forth the results of its inquiry as follows (pp. 649-650):

> "The foregoing view of the powers of the Commission under the act finds confirmation, if that be needed, in the committee reports and the statements of those in charge of the legislation, as well as in the debate which took place in the Senate, extending over weeks of time and covering hundreds of pages in the Congressional Record. In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words 'unfair methods' was meant those resorted to for the

purpose of destroying competition or of eliminating a competitor or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant competitors; that it was an effort to make competition stronger in its fight against monopoly; that unfair competition was that practice which destroys competition and establishes monopoly."

The court points out further (p. 648) that:

"The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

Finally it is observed (p. 649):

"Unfair trade methods are not *per se* unfair methods of competition."

When the record in this cause and the findings of the Commission are appraised in the light of these principles, it is clear that no case cognizable by the Commission—no case falling within the intendment or purpose of the Act—has been made out against these respondents.

Specifically, there is neither allegation nor proof of conspiracy among the respondents. Counsel for the Commission has formally stipulated of record that "no conspiracy among these several respondents being (is) charged or proved herein" (R. 26).

There is neither charge nor proof of any act tending to "the destruction of competition or the restriction of it in a substantial degree".

There is neither charge nor proof that respondents have resorted to any course "for the purpose of destroying competition or of eliminating a competitor".

There is neither charge nor proof of any course of action tending "unfairly to destroy or injure the business of a competitor".

Clearly these respondents have been charged with no offense within the range of the statutory provisions which the Federal Trade Commission was created to enforce.

It seems to have been the view of the Federal Trade Commission that its powers exceed the provisions of the Sherman Anti-Trust Act and the Clayton Act and extend alike beyond the range of the law of unfair competition. As we read the decisions of this court, however, the pre-existing law of "unfair competition" was not expanded by the Federal Trade Commission Act. This much has been determined by the cases already cited. And note may be taken of the fact that the cases dealing with unfair competition characteristically hold that "fraudulent purpose", "wrongful, fraudulent intention", "intent to deceive", "fraudulent misrepresentations" are indispensable elements of the offense. Such "fraudulent purpose" or "intent to deceive" must be established, either directly or as a justifiable "inference from the inevitable consequences of the act complained of". Representative decisions are:

Elgin National Watch Co. v. Illinois National Watch Co., 179 U. S. 665;

Howe Scale Co. v. Wyckoff, Seamans, etc., 198 U. S. 118;

Thum v. Dickinson, 245 Fed. 609;

Queen Mfg. Co. v. Ginsberg & Bros., 25 Fed. (2d) 284;

Vortex Mfg. Co. v. Ply-Rite Contracting Co., 33 Fed. (2d) 302.

Not only are the respondents free of wrongful motive, but in the succeeding subdivision we shall undertake to make it clear that they are not chargeable with fraud, dishonesty or deception in any form.

IV.

NEITHER FRAUD, DISHONESTY NOR DECEPTION HAS BEEN FOUND AGAINST RESPONDENTS.

We are familiar with no decision of this court in which an order of the Commission compelling a revision of trade nomenclature has been sustained in the absence of satisfactory proof of dishonesty, fraud or deception in the origin or use of the name.

The Commission's "Findings as to the Facts" are set forth in 80 paragraphs, reproduced upon pages 28 to 44, inclusive, of the record. Upon a careful reading of the entire text it will be found that *there is no finding or suggestion of fraud, dishonesty or deception in any particular.* There is not a sentence which reflects even remotely upon the conduct of the respondents in the use of their trade name. There are findings of "confusion" (due to general unfamiliarity with botanical distinctions and nomenclature), but not a word ascribing or imputing

to these respondents anything in the nature of wrongful conduct.

The Commission has set forth its conclusions under the caption "Summary and Conclusions of Fact" (R. 44-45). These conclusions are not binding upon the reviewing court, but we find that even here no fraudulent or dishonest act has been ascribed to respondents. The net result of this examination of the Commission's entire report is that *the Commission has found neither a wrongful motive nor a wrongful act on the part of these respondents.* In this behalf we note that—

1st: The Commission has found no case of fraud or fraudulent representation on the part of the producers of "California White Pine".

2nd: The Commission has made no finding against these respondents of deception in fact.

3rd: The Commission has expressly exonerated these respondent lumber manufacturers of any "express declaration to their customers that said products" (*ponderosa*) "are true white pine". (Commission's findings, Paragraph twenty-nine—R. 33.)

4th: The Commission has made no finding that *ponderosa* lumber has been furnished or "substituted" by any respondent upon an order for "true white pine".

There is no testimony of record from any witness (jobber, retailer, architect or consumer) to the effect that he has purchased "California White Pine" in the belief that he is obtaining so-called "true white pine". The final

paragraph (Paragraph (o)) of the Commission's "Summary and Conclusions of Fact" (R. 45) is wholly unsupported by concrete testimony of this character.

The conclusion is impelled, upon a review of the findings themselves, that the essential ingredients of a charge of "unfair methods of competition" have not been made out against these respondents.

The brief for the Federal Trade Commission relies upon the decision of this court in

Federal Trade Commission v. Winsted Hosiery Co., supra.

The facts of that case are not in parallel with the facts here presented, and the decision is inapposite. It will not be difficult to point the distinction.

In the *Winsted* case the Federal Trade Commission was confronted with a deliberate and premeditated act on the part of a hosiery manufacturer in placing palpably false and misleading labels on his goods. Underwear which contained only a small percentage of wool, "some as little as ten per cent", was branded or labelled as "Natural Merino", "Natural Wool", "Australian Wool" and similar terms. The bulk of the fabric was cotton. The manufacturer was falsely representing that his *cotton* was *wool*. The deliberate purpose and necessary effect of his course was to deceive the public and of course unfairly to compete with "honest manufacturers". This court found that the labels in question were "literally false" and in most instances "palpably so". *There was intent to deceive.* It was held that the public is entitled to protection against

such deception and that "honest manufacturers" are entitled to protection against such unfair competition.

Clearly this case affords no precedent against these respondents. In the *Winsted* case the offending manufacturer was guilty of a dishonest purpose and a dishonest practice. No such dishonest purpose or practice was or could be established in the instant proceedings. There has here been no desire to mislead the consumer or to obtain an advantage over "honest manufacturers". Respondents are not misrepresenting either the quality or the utility of their product. The sole motive which led to the adoption of the commercial name "California White Pine" was accurately and properly to characterize this lumber with respect to its quality and utility, to avoid confusion with "Southern Yellow Pine" and to identify it with respect to the locality of its origin. We need not repeat the testimony upon this question, for, as previously noted, the admission has been made on the part of the Commission that in the adoption of this name there was no purpose or intent to mislead or deceive the trade or the public. This admission effectively places this case outside the *Winsted Hosiery* case and related cases.

We have heretofore noted the present contention of the Commission that although the term "California White Pine" came into being in response to an honorable purpose and although this name was not adopted for the purpose of misleading the trade or the public, nevertheless a wrongful motive may be "imputed" to respondents because they are not now willing to cease the use of their long-established and well-known trade name. We may

note that in the brief filed for the Commission in the Circuit Court of Appeals (p. 81) it was expressly conceded that the evidence of respondents' witnesses "does not go to the point that petitioners" (respondents) "have a fraudulent motive * * *". In spite of this concession it was nevertheless insisted that "a motive wrongful in law is imputed to them * * *".

The desire, honest in purpose, of these manufacturers to retain their established trade name cannot thus be translated into wrongful motive. The Commission has made no finding of intent to deceive, either past or present, and on this record it is plain that it could not do so. Respondents' present intent is the same as was that of their predecessors who first used the name "California White Pine" many years ago. It is to avoid rather than to create confusion; it is to place this wood in commerce where it justly and inevitably belongs. Dishonest motive or intent could not be imputed to those who originated the name, nor can such motive or intent be imputed to respondents now.

V.

THE COMMISSION EXCEEDED ITS PROVINCE IN ORDERING A SUPPRESSION OF RESPONDENTS' TRADE NAME.

Reliance is placed by the Commission upon the decision of this court in

Federal Trade Commission v. Royal Milling Co., 288 U. S. 212, 216-217; 77 L. Ed. 493; 53 S. Ct. Rep. 335 (1932).

That case seems rather to be an authority favorable to these respondents. There the respondents were doing business under such names as "Royal Milling Company" although none of the respondents was actually engaged in the performance of any milling operations. In brief, they were not "grinders of wheat". The orders of the Federal Trade Commission forbade the use of the words "milling company" or words of like import. Upon review the Circuit Court of Appeals set aside the orders. The case was brought to this court on certiorari and it was there held that "the purchasing public is entitled to be protected against this species of deception". In the instant case the Commission has not found that respondents are guilty of any "species of deception" whatever.

It should be expressly noted, however, that although the court sustained the Commission's findings and conclusions, it found that *"the Commission went too far in ordering what amounts to a suppression of the trade names"*. The court continues (p. 217):

> "These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. *The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names.*" (Emphasis supplied)

(The court here cited *Fluegelman & Co. v. Federal Trade Commission,* 37 Fed. (2d) 59, 61; *Federal Trade Commission v. Cassoff,* 38 Fed. (2d) 790; *Federal Trade Commission v. Good-Grape Co.,* 45 Fed. (2d) 70, 72.)

If this decision is in any respect pertinent to the pending controversy, it shows clearly that the Federal Trade Commission has exceeded its proper province *in attempting a suppression of trade names which have been in use for upwards of 30 years.* The most that the Commission could properly require upon this record is the use of "proper qualifying words". We have a proper qualifying word—viz., "*California*"—in the trade name which is here under review. It gives this lumber a separate and specific identification.

It would seem accordingly that the present trade name used by respondents conforms with the essence of the principle laid down by this court in the *Royal Milling Co.* case. The name does afford a specific identification of the lumber. This is precisely what respondents desire. They believe that their full trade name has value. It is difficult to see that greater particularity can be attempted without exceeding the requirements of reason.

Respondents stand upon the propriety of including the word "white" in their trade name, not only because of long usage but because it serves appropriately to indicate the essential properties and industrial uses of the lumber. The elimination of the word "white", as the orders of the Commission require, would wholly deprive these manufacturers of a trade name which will suggest either the characteristics or the utility of the product.

We find nothing in the opinion of this court in the *Royal Milling Co.* case or in any other decision which can remotely justify the extraordinary requirement of the Commission's orders that respondents

> *"do cease and desist from using either orally or in writing, the word 'white' in connection, combination or conjunction with the word 'pine' or in connection with other word or words used in combination or conjunction with the word 'pine'."*

VI.

THE PUBLIC INTEREST REQUIREMENT HAS NOT BEEN SUSTAINED OF RECORD. THE DECISION OF THE COURT BELOW WAS NOT RESTED UPON A CONSIDERATION OF FOREST CONSERVATION.

The brief for the Commission assails the conclusion of the court that the action of the Commission was not in the interest of the public. We submit that the court correctly so held.

It is our view that the opposing brief fails aptly to state or fairly to characterize the substance of the opinion of the Circuit Court of Appeals in dealing with the question of public interest. That court specifically found, on a review of the record, that the evidence before the Commission was insufficient to show that action by the Commission to force a change in this long established trade name was in the public interest. The court examined the evidence and considered the Commission's findings and

advisedly reached a conclusion adverse to the Commission on this jurisdictional issue.

The lower court did not hold, as the opposing argument would imply, that the public is not injured by false and misleading commercial names. It held rather that the term "California White Pine" is neither false nor misleading. It expressly distinguished the decision of this court in *Federal Trade Commission v. Winsted Hosiery Company,* supra, which condemned trade names which are palpably false and misleading and injurious both to honest manufacturers and the consuming public.

In substance the court found nothing false, misleading or dishonest in the use of "California White Pine" by respondents as the commercial name for their lumber. The court could appropriately have added that there is no concrete evidence of record that the use of this trade name has caused any member of the public to purchase or use lumber which otherwise he would not have ordered.

Pending Controversy Essentially Private in Nature.

The blunt truth is that the proceedings before the Commission "arose out of a controversy essentially private in its nature". As we view it, the action of the Commission in this trade name controversy was not in the public interest but was responsive to its preoccupation with internal trade name disputes.

Proof that this controversy is of private origin is found in the text of the complaints themselves, which recite in Paragraph Eight (R. 8) that

> "in or about the years 1924 and 1925 there was among various manufacturers of lumber an advocacy of, on the part of some, and an opposition on the part of others to, a proposal to change the trade name and designation of forest products made from Pinus ponderosa from 'white pine' or from the designations named in Paragraph Three thereof which include the words 'white pine' to some other designation and particularly to 'pondosa' pine * * *."

Such is the origin of this trade name controversy, as authoritatively declared by the Commission in its own pleadings. (See also R. 1203, 4.) The refusal of these respondents to abandon "California White Pine", with the prestige gained by more than thirty years of use, eventuated in an effort on the part of certain lumber manufacturers to persuade the Federal Trade Commission to intervene. We feel free to declare that the objective of the proceedings, although covert as far as the findings and order are concerned, is to compel respondents to accept "pondosa" (or "ponderosa")—an unpalatable and lately coined trade name—a corruption of a Latin word employed by botanists.

Not only have these proceedings been motivated by disaffected lumber manufacturers following a controversy suddenly precipitated respecting trade nomenclature, but there is neither suggestion nor proof of any complaint on the part of the public respecting "California White Pine". There is no evidence that any purchaser or consumer of lumber has expressed dissatisfaction with "California White Pine" or has pressed for a change in name. The

controversy in which the Commission intervened was not of public cognizance but was purely a private controversy within an industry.

This court has held that the Commission may not competently intervene in a controversy which is essentially private in its nature.

Federal Trade Commission v. Klesner, 280 U. S. 19; 74 L. Ed. 131; 50 S. Ct. Rep. 5.

The following language excerpted from page 29 of the opinion of the court in that case appears to be apposite:

> "If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner."

It is highly significant that the pending controversy *did not arise until at least twenty-seven years after the term "California White Pine" had become standard in the general lumber trade. The Commission did not issue its complaints until May, 1929, or some twenty-nine years thereafter. Obviously, the complaints followed upon the refusal of these respondents to submit to the demand of competing producers and join in the adoption of a novel and unwelcome trade name.*

Paraphrasing the words of the Supreme Court above quoted, it would seem that

> If members of the public were in 1929 or later seriously interested in the matter, it must have been because they had become partisans in the private controversy between the producers of "California

White Pine", on the one hand, and the producers of "Northern White Pine", "Idaho White Pine", "Sugar Pine" and "Pondosa" on the other hand.

Enough has been said, we think, to make it clear that these complaints have emanated from a purely private controversy and that they are not founded upon a genuine public interest. The record is barren of any public complaint against "California White Pine" and equally barren of any demand from purchasers or consumers that existing trade nomenclature be changed.

Reference to the Policy of Conservation.

The opposing brief seeks to find in a casual observation of the lower court respecting forest conservation some indicia of an excess of jurisdiction. We may concede that the comment was "collateral and immaterial", but it has been treated in the opposing brief as if it constituted a ground of the decision. We think that this treatment is unfair to the opinion of the lower court and that the argument founded upon it is misconceived. The sentence to which exception is taken reads as follows:

> "The public is not only interested in not being deceived in the material it purchases under a certain nomenclature, but possibly in an even larger sense in the conservation of the forests." (R. 1890.)

This has been translated in the opposing brief into a holding that "Public interest in 'conservation of forests' was held to outweigh the public interest in maintaining fair competition * * *" (Brief for Commission, p. 11).

At the worst, the observation thus made by the court was surplusage, and could not possibly be reversible error. It was enough that the court found that the evidence before the Commission was insufficient to support its conclusions with respect to unfair methods of competition and with respect to the public interest. These are the jurisdictional prerequisites, and it was immaterial, at most, that the court suggested further considerations militating against the Commission's action.

(4 *Corpus Juris* 1057.)

It will be clear upon a reading of the entire opinion of the lower court that the remark respecting forest conservation was casually made, and merely parenthetical in character. It was not a ground of the decision. The comment was harmless and the extended effort made in the opposing brief to convert this observation into judicial error seems rather exaggerated. As we view it, a feigned issue has been raised.

Even if the statement were deemed to be error, the action of the court would not thereby be invalidated. It is enough that neither the record nor the findings can serve to make out a case of "unfair competition" as defined by this court.

VII.

THE CIRCUIT COURT OF APPEALS MADE NO INDEPENDENT APPRAISAL OF THE EVIDENCE; NEITHER DID IT REJECT ANY OF THE EVIDENTIARY FINDINGS MADE BY THE COMMISSION.

The final argument tendered by the opposing brief is to our minds wholly without foundation in point of fact. It is insisted that the court exceeded its jurisdiction "by making its own independent appraisal of the evidence and rejecting all of the essential findings made by the Commission". (Brief for Commission, p. 66.) We are compelled to challenge this characterization of the court's action in its entirety. We insist that the court recognized and faithfully observed the limitation upon its reviewing jurisdiction as fixed by this court. Upon the very threshold of its opinion the lower court stated that if the findings of the Commission are supported by the testimony, such findings shall be conclusive (R. 1890). It entered upon its examination of the record with this limitation in mind, and it scrupulously refrained from transgressing that limitation.

Unquestionably the court reviewed the evidence, and in the light of the findings of the Commission. Such was its right and duty. As previously noted, this court has held that the Circuit Court of Appeals has power in these cases "to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission".

Federal Trade Commission v. Curtis Publishing Company, supra.

We have been unable to find upon an examination of the opinion of the court below that any evidentiary finding of the Commission was rejected. The court reported certain matters which were material, and as to which the Commission refrained from making findings, but this was within the reviewing power.

The Reviewing Court is not Bound by the Commission's Conclusions as to Ultimate Facts.

The real complaint tendered by the opposing argument is that the court refused to accept the ultimate determination of what constitutes "unfair methods of competition". This was within the province of the court. Moreover, the court was not obligated to accept the Commission's conclusions as to "ultimate facts" as distinguished from "evidentiary facts". It is clear upon the authorities that, while the Commission's evidentiary findings are conclusive if supported by evidence, the court is not bound by the Commission's "conclusion as an ultimate fact". As the Circuit Court of Appeals for the Third Circuit said in

Temple Anthracite Coal Co. v. Federal Trade Commission, 51 Fed. (2d) 656, 659,

> "We will therefore consider whether that ultimate finding of fact is sustained by the basic facts as found from the evidence before the Commission. While the Act provides that the findings of fact made by the Commission are final and conclusive, it still remains the duty of the supervising court to determine whether the facts found are such as to warrant the conclusion * * *."

See also

Federal Trade Commission v. Curtis Publishing Co., supra;

International Shoe Company v. Federal Trade Commission, 280 U. S. 291, 297; 50 S. Ct. Rep. 89, 91; 74 L. Ed. 431.

It will be found upon detailed examination of the opinion of the court below that it has rejected none of the evidentiary findings of the Commission but has kept expressly within the limits of its reviewing jurisdiction.

CONCLUSION.

Neither the record nor the Commission's findings can serve to make out a case of "unfair methods of competition" against these respondents.

Respondents are not charged with any practice tending to "the destruction of competition or the restriction of it in a substantial degree".

They are not charged with practices tending "unfairly to destroy or injure the business of a competitor".

They are not charged with attempted monopoly or restraint of trade.

They are not charged with fraudulent or deceitful purpose nor with fraud or deception in fact.

The record shows without conflict that the trade name which respondents defend was adopted for a proper and lawful purpose, and that it has never been used by re-

spondents for a fraudulent, deceitful or other wrongful purpose.

These, as we conceive it, are the determinants of unfair methods of competition. All else is unrelated to the authority reposed in the Commission with respect to "unfair methods of competition".

If the Commission may competently assert the authority which it claims in its petition for certiorari in this cause —viz.,

> "Where a commercial name was originally adopted without improper motive or purpose, to compel use of more accurate and specific commercial names than those heretofore employed" (Petition for certiorari, p. 10)

—it should be content with the requirement that the full name "California White Pine" should always be used. If a still more "accurate and specific commercial name" should be proved necessary, this can be readily attained, as shown by the decision of this court in the case of

Federal Trade Commission v. Royal Milling Co., supra.

These respondents have no objection to "accurate and specific commercial names", but they stand upon the right to retain the word "white" in their commercial name, not only because of the goodwill acquired through many years of continuous use, but because it is indispensable in denoting the essential character and utility of the lumber.

The Circuit Court of Appeals correctly held that the record "is insufficient to support findings that petitioners'

use of the commercial name 'California white pine' is an unfair method of competition or that its prevention would be in the interest of the public''.

Respectfully submitted,

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Dated: San Francisco, California,
November 29, 1933.

(APPENDIX FOLLOWS)

Appendix

In this appendix we present a group of charts (lettered A to F, inclusive) prepared from the record and showing that the lumber of *Pinus ponderosa,* when tested with respect to mechanical properties, falls *within the limits set by the lumbers of the other white pines of commerce.* Contrasted with these white pines the mechanical properties of southern yellow pine and of "Douglas Fir" are also shown.

CHART A

WEIGHT OF WOODS

POUNDS PER CUBIC FOOT, AIR-DRY CONDITION

(FROM U.S. DEPT. AGR. BULL. 556, RESPONDENTS' EXHIBIT 21.)

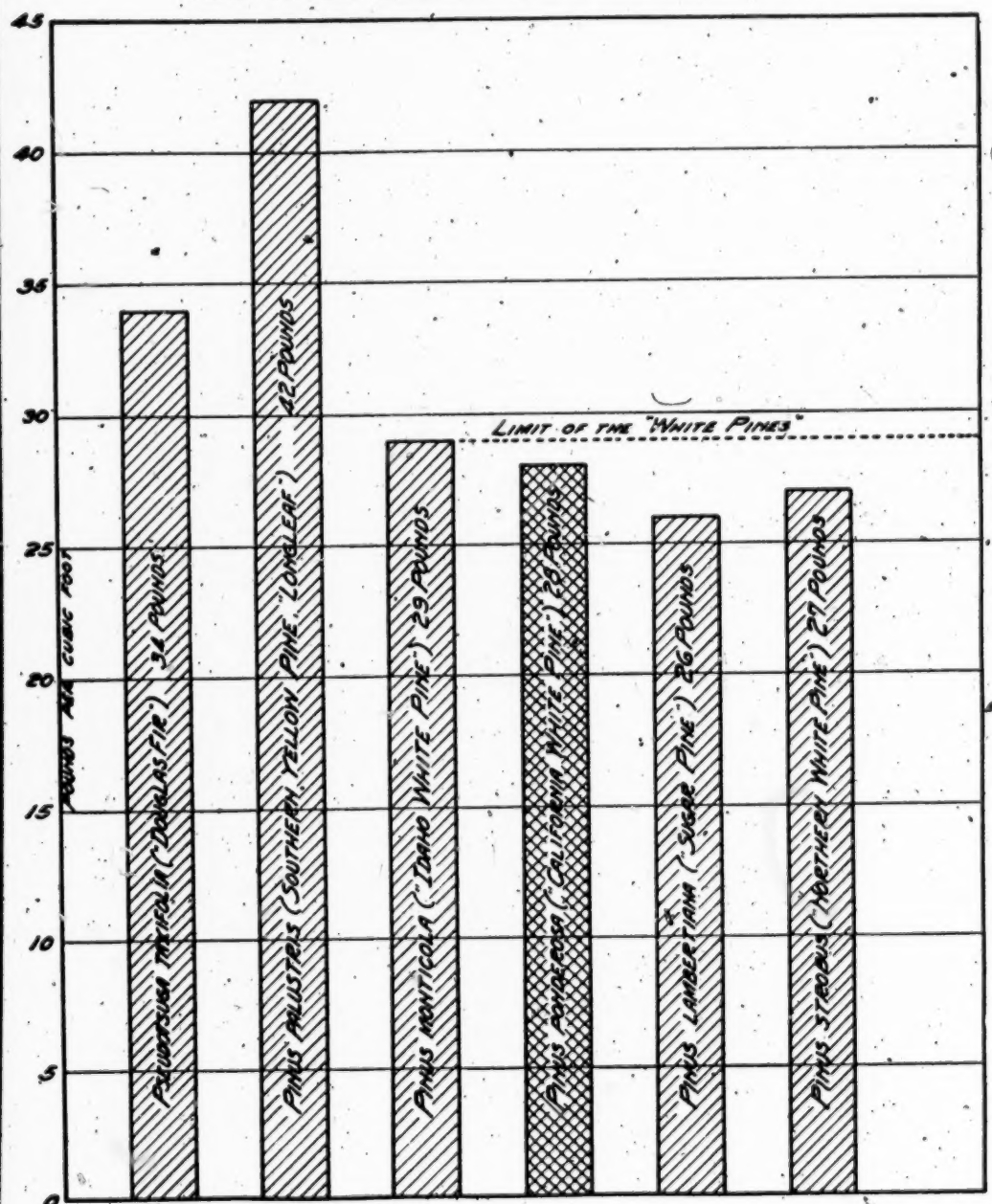


CHART B

STIFFNESS OF WOODS

MODULUS OF ELASTICITY, AIR-DRY

(FROM U.S. DEPT. AGR. BULL. #556, RESPONDENTS EXHIBIT 21.)

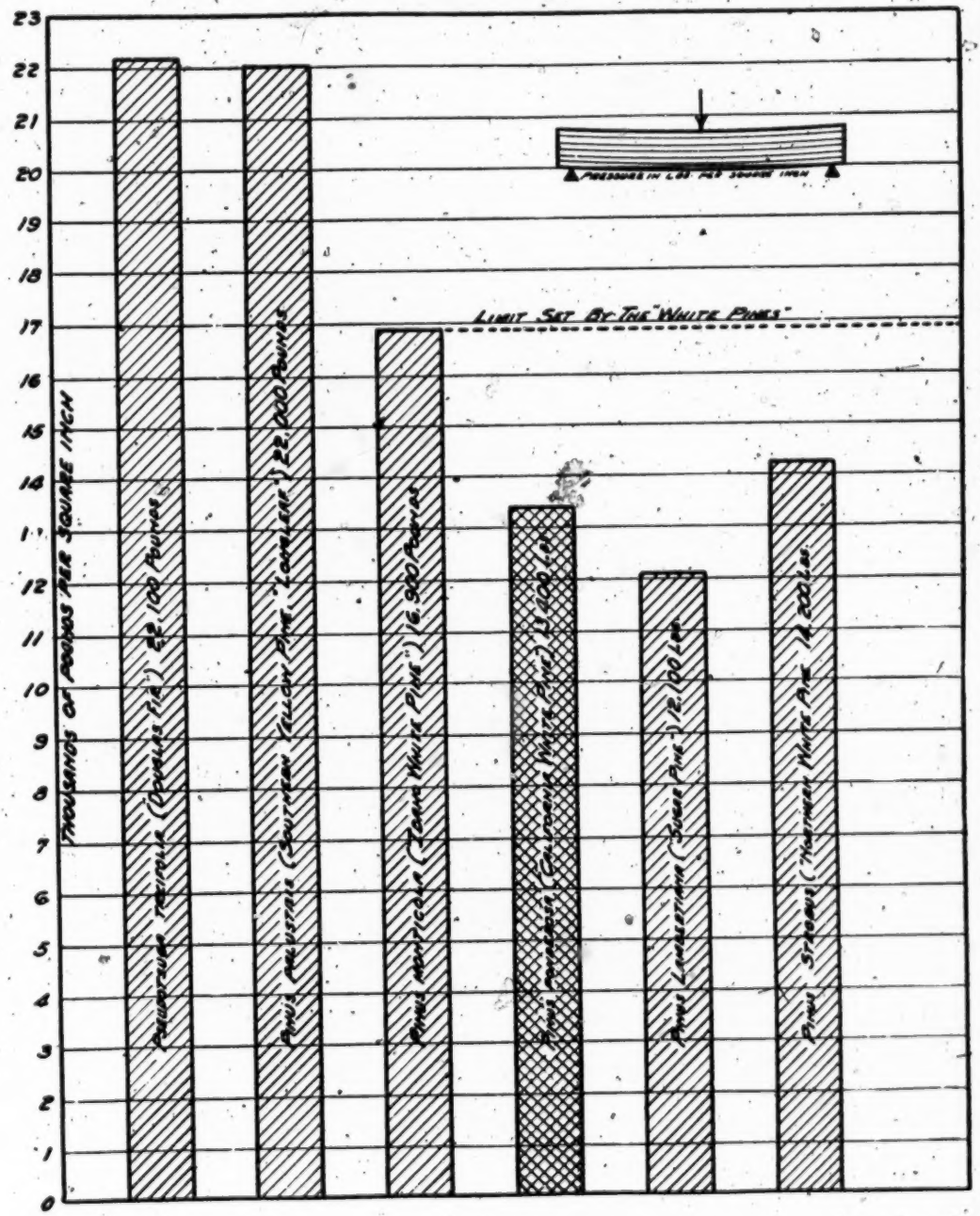


CHART C

STRENGTH OF WOODS

MODULUS OF RUPTURE IN BENDING, — AIR DRY

(FROM U.S. DEPT. AGR. BULL. #556, RESPONDENTS' EXHIBIT 21.)

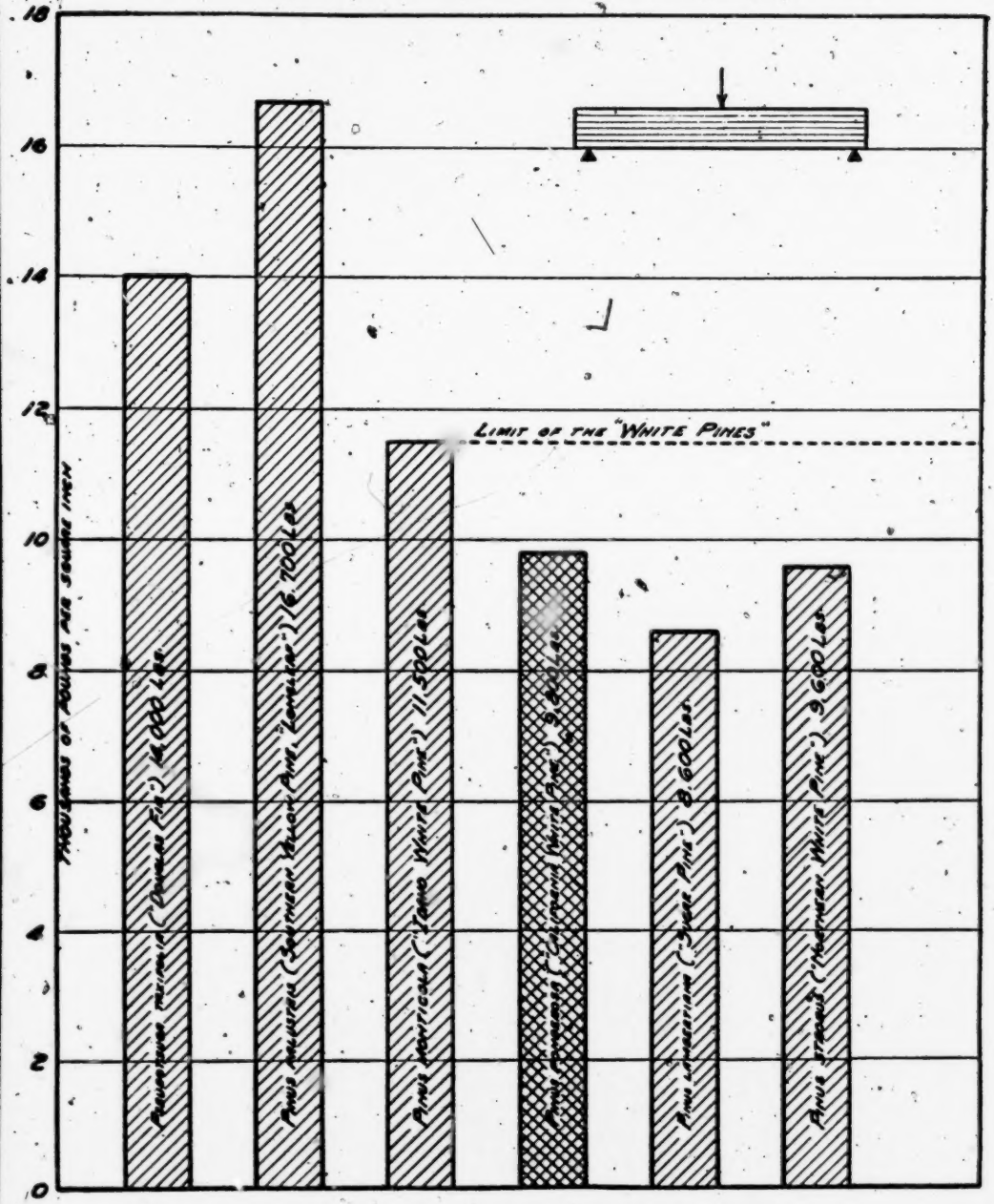


CHART D

HARDNESS (SIDE SECTION)

(LOAD REQUIRED TO IMBED A 0.444 INCH BALL TO ONE HALF ITS DIAMETER, – AIR DRY)

(FROM U.S. DEPT. AGR. BULL. 556, RESPONDENTS' EXHIBIT 21.)

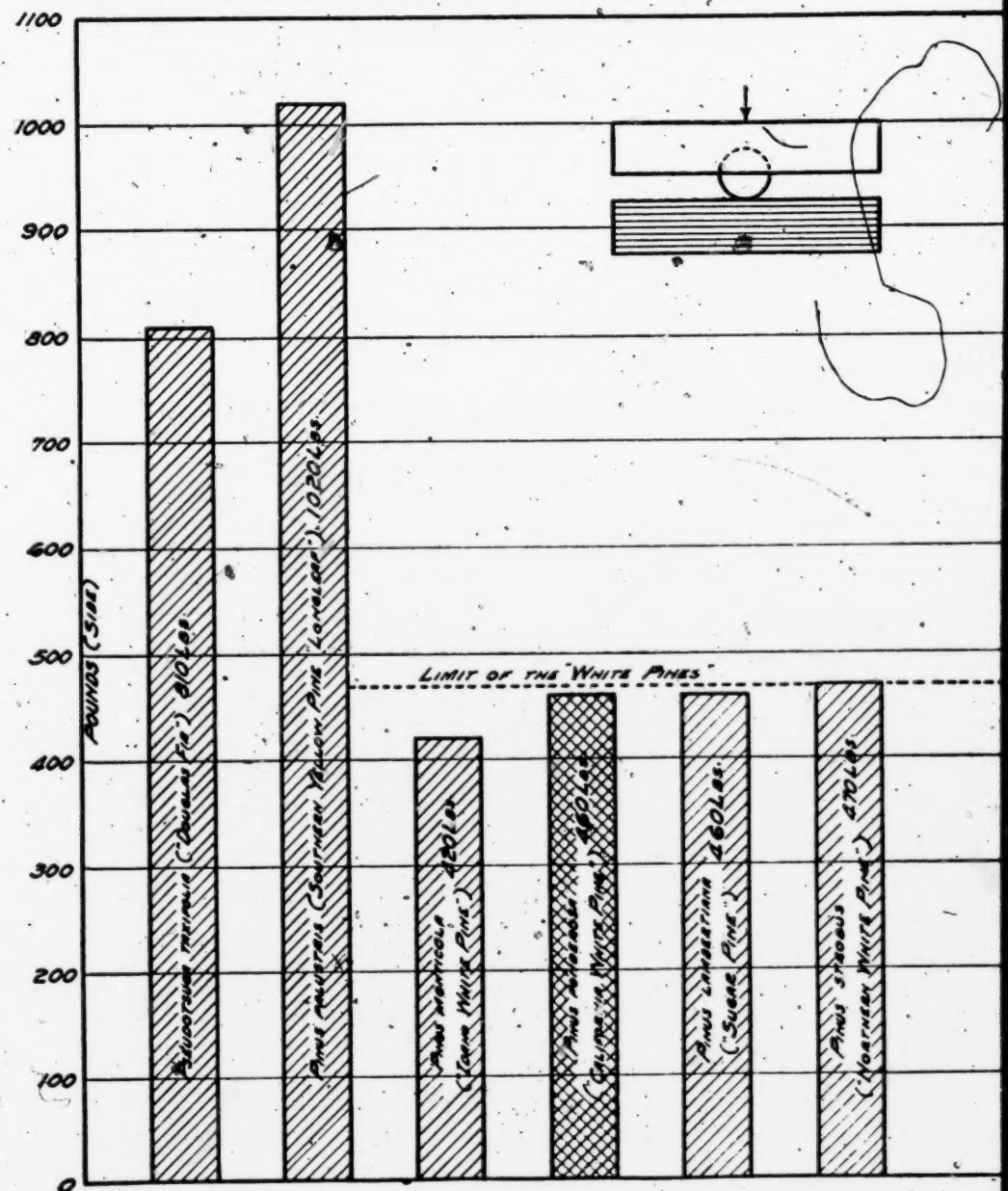


CHART E

HARDNESS (END SECTION)

(LOAD REQUIRED TO IMBED A 0.444 INCH BALL TO ONE HALF ITS DIAMETER.-AIR DRY)

(FROM U.S. DEPT. AGR. BULL. 556, RESPONDENTS EXHIBIT 21.)

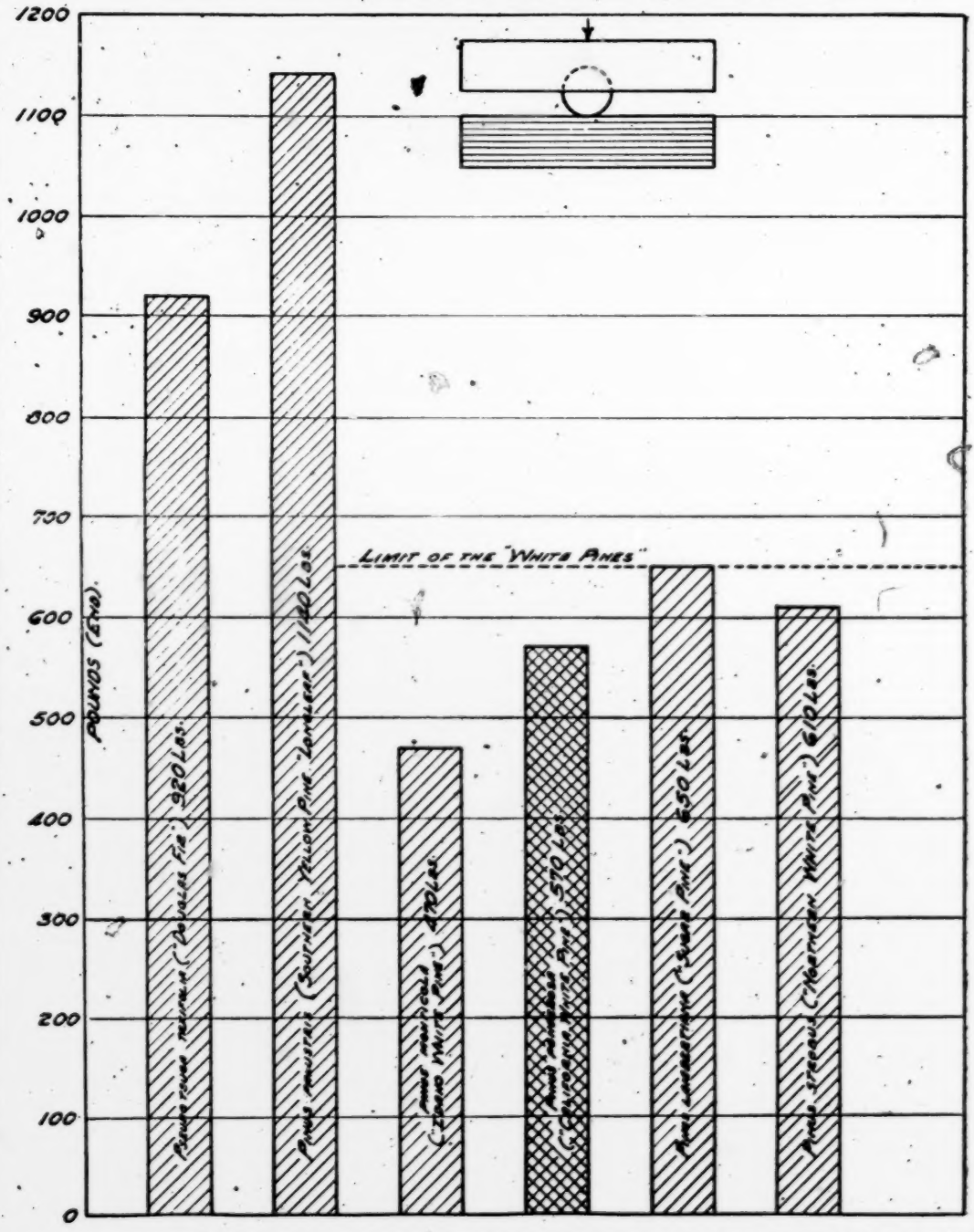


CHART F

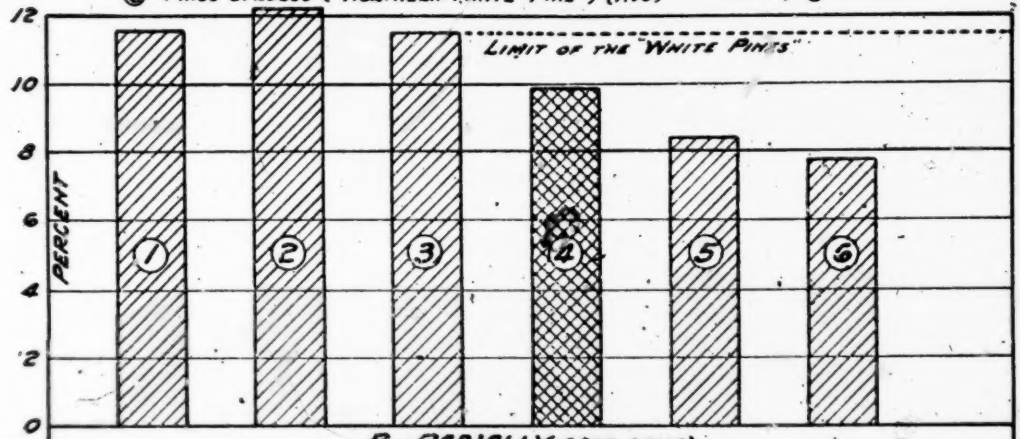
SHRINKAGE

FROM GREEN TO OVEN-DRY CONDITION

(FROM U.S. DEPT. AGR. MISC. PUB. 46. RESPONDENTS' EXHIBIT 22.)

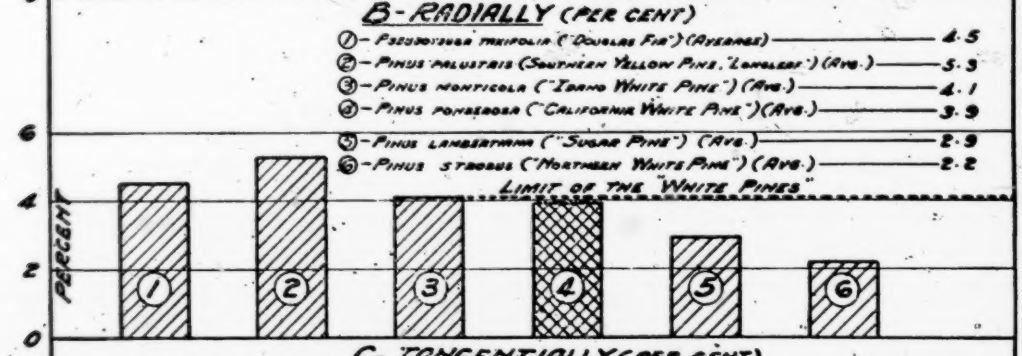
A-IN VOLUME (PER CENT)

1. PSEUDOTSUGA TAXIFOLIA ("DOUGLAS FIR") (AVERAGE) — 11.6
2. PINUS PALUSTRIS (SOUTHERN YELLOW PINE "LONGLEAF") (AVG.) — 12.2
3. PINUS MONTICOLA ("IDAHO WHITE PINE") (AVG.) — 11.5
4. PINUS PONDEROSA ("CALIFORNIA WHITE PINE") (AVG.) — 9.9
5. PINUS LAMBERTIANA ("SUGAR PINE") (AVG.) — 8.4
6. PINUS STROBUS ("NORTHERN WHITE PINE") (AVG.) — 7.8



B-RADIALLY (PER CENT)

1. PSEUDOTSUGA TAXIFOLIA ("DOUGLAS FIR") (AVERAGE) — 4.5
2. PINUS PALUSTRIS (SOUTHERN YELLOW PINE, "LONGLEAF") (AVG.) — 5.3
3. PINUS MONTICOLA ("IDAHO WHITE PINE") (AVG.) — 4.1
4. PINUS PONDEROSA ("CALIFORNIA WHITE PINE") (AVG.) — 3.9
5. PINUS LAMBERTIANA ("SUGAR PINE") (AVG.) — 2.9
6. PINUS STROBUS ("NORTHERN WHITE PINE") (AVG.) — 2.2



C-TANGENTIBLLY (PER CENT)

1. PSEUDOTSUGA TAXIFOLIA ("DOUGLAS FIR") (AVERAGE) — 7.1
2. PINUS PALUSTRIS (SOUTHERN YELLOW PINE "LONGLEAF") (AVG.) — 7.5
3. PINUS MONTICOLA ("IDAHO WHITE PINE") (AVG.) — 7.4
4. PINUS PONDEROSA ("CALIFORNIA WHITE PINE") (AVG.) — 6.3
5. PINUS LAMBERTIANA ("SUGAR PINE") (AVG.) — 5.6
6. PINUS STROBUS ("NORTHERN WHITE PINE") (AVG.) — 5.9